Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Wholly Owned Subsidiaries and Individual Facilities and each of them *and* District 1199P, National Union of Hospital and Health Care Employees, AFL–CIO *and* Service Employees International Union, Local 585, AFL–CIO *and* Pennsylvania Social Services Union, Service Employees International Union, Local 668, AFL–CIO *and* International Union of Operating Engineers, Local 547, A, B, C, D, H, AFL–CIO *and* Service Employees International Union, AFL–CIO *and* Service Employees International Union, Local 79, AFL–CIO *and* Teamsters, Local Union No. 839 a/w International Brotherhood of Teamsters, AFL–CIO[1] *and* Service Employees International Union, Local 96, AFL–CIO *and* District 1199C, National Union of Hospital and Health Care Employees, AFL–CIO *and* Service Employees International Union, Local 606, AFL–CIO *and* Minnesota Licensed Practical Nurses' Assoc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America & Local 838, AFL–CIO *and* United Food and Commercial Workers International Union, Local 917, AFL–CIO *and* Communications Workers of America, AFL–CIO *and* Elias Pierre *and* Malcom Campbell *and* New England Health Care Employees, District 1199, National Union of Hospital and Health Care Employees, AFL–CIO *and* Precious Beasley *and* United Steelworkers of America, AFL–CIO *and* United Food and Commercial Workers Union Local No. 73-A, affiliated with United Food and Commercial Workers International Union, AFL–CIO *and* Torrington Extend-A-Care Employee Association. Cases 6–CA–19444, 6–CA–19494, 6–CA–19495–1, 6–CA–19538, 6–CA–19676, 6–CA–19720, 6–CA–19726, 6–CA–19736, 6–CA–19744, 6–CA–19745, 6–CA–19793(1–2), 6–CA–19861, 6–CA–19871, 6–CA–19936, 6–CA–19937, 6–CA–19944, 6–CA–19996, 6–CA–19997, 6–CA–19998, 6–CA–20018, 6–CA–20144–2, 6–CA–20185, 6–CA–20188–1 (formerly 4–CA–16262), 6–CA–20188–10 (formerly 4–CA–16466), 6–CA–20188–11 (formerly 4–CA–16461), 6–CA–20188–12 (formerly 4–CA–16321), 6–CA–20188–13 (formerly 4–CA–16325), 6–CA–20188–14 (formerly 4–CA–16432), 6–CA–20188–15 (formerly 4–CA–16438), 6–CA–20188–19 (formerly 4–CA–16509–2), 6–CA–20188–30 (formerly 4–CA–16710), 6–CA–16804 (formerly 4–CA–16804–2), 6–CA–20188–31 (formerly 4–CA–16756–2), 6–CA–20188–33 (formerly 4–CA–16943–1), 6–CA–20188–50 (formerly 4–CA–17921–1), 6–CA–20188–51 (formerly 4–CA–17921–4), 6–CA–20188–52 (formerly 4–CA–18176), 6–CA–20267, 6–CA–20323, 6–CA–20331, 6–CA–20331–1, 6–RC–9981, 6–CA–19821, 6–CA–20028, 6–CA–20321, 6–CA–20322, 6–CA–20188–7 (formerly 4–CA–16156–1–2, 4–CA–16535), 6–CA–20188–2 (formerly 7–CA–26580), 6–CA–20188–3 (formerly 16–CA–13060), 6–CA–20188–4 (formerly 7–CA–26846–1–2), 6–CA–20188–6 (formerly 7–CA–26817–1), 6–CA–20188–34 (formerly 7–CA–27578), 6–CA–20188–38 (formerly 7–CA–27857), 6–CA–20188–39 (formerly 7–CA–27876), 6–CA–20188–43 (formerly 7–CA–28180), 6–CA–20188–5 (formerly 19–CA–18976), 6–RC–9927 (formerly 19–RC–11518), 6–CA–20188–16 (formerly 17–CA–13255), 6–CA–20188–44 (formerly 17–CA–13897), 6–CA–20188–17 (formerly 17–CA–16366), 6–CA–20188–24 (formerly 17–CA–16712), 6–CA–20188–18 (formerly 16–CA–13111), 6–CA–20188–20 (formerly 18–CA–9994), 6–CA–20188–21 (formerly 18–CA–9988), 6–CA–20188–22 (formerly 18–CA–18767), 6–CA–20188–25 (formerly 18–CA–18800), 6–CA–20188–23 (formerly 14–CA–19080), 6–CA–20188–32 (formerly 14–CA–19301), 6–CA–20188–28 (formerly 1–CA–24979), 6–CA–20188–29 (formerly 14–CA–19262), 6–CA–20188–35 (formerly 1–CA–25258–1), 6–CA–20188–36 (formerly 1–CA–25258–2), 6–CA–20188–41 (formerly 39–CA–3665), 6–CA–20188–37 (formerly 7–CA–27860), 6–CA–20188–40 (formerly 9–CA–25168), 6–CA–20188–42 (formerly 30–CA–10073), and 6–CA–20188–45 (formerly 39–CA–3883)

January 29, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 9, 1990, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and con-

[1] The name of Charging Party Teamsters has been changed to reflect the new official name of the International Union.

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent committed certain unfair labor practices at some facilities, but, apparently inadvertently, omitted reference to the specific section of the Act that had been violated. We correct those omissions as follows: (1) Beverly Manor of Monroeville. The Respondent violated Sec. 8(a)(1) by enforcing its telephone policy more strictly because of the union activity of its employees and by reprimanding Josephine Belice for her use of the

clusions as modified and to adopt the recommended Order as modified and set forth in full below.

I.

This consolidated case concerns allegations that the Respondent committed scores of unfair labor practices at 35 facilities throughout the United States. The judge found that the Respondent violated Section 8(a)(1), (3), and (5) as alleged at 33 facilities, that it has demonstrated a proclivity to violate the Act, and that a broad cease-and-desist order, applicable to all the Respondent's facilities nationwide, would best effectuate the policies of the Act.

The Respondent, Beverly Enterprises, is a California corporation which owns and operates nearly 1000 nursing homes and extended care facilities throughout the United States. Throughout most of this litigation, the Respondent's corporate structure was organized into five operating divisions referred to as the Eastern, Southern, Central, Western, and Texas Divisions,[3] which report to corporate headquarters in Pasadena, California. Each operating division is directly responsible for the individual facilities within its division.

Each division contains vice presidents of operations and human resources with regional or area managers, human resource representatives, and labor relations representatives reporting to them. Each facility is managed by an administrator, a director of nursing (DON), and, usually, an assistant director of nursing (ADON). The facilities are staffed with licensed practical nurses (LPNs) or licensed vocational nurses (LVNs), who usually serve as charge nurses, and nurses aides who assist them. In addition, the facilities usually contain a dietary department with a supervisor, cooks, and dietary aides; a housekeeping department, also with a supervisor and service personnel; and a laundry department with a supervisor and laundry aides. The Respondent has admitted it is a single employer with all its operating divisions and individual facilities.

The charges were filed by 3 individuals alleged to be discriminatees, and the 18 labor organizations involved in this consolidated litigation. The judge found that the Respondent committed one or more unfair labor practices at all but 2 of the 35 facilities involved in this litigation during the 2 years between 1986 and 1988. He dismissed the allegations at the two facilities. The overwhelming majority of the violations occurred in the context of union organizing activity at 23 facilities. Except as set forth below, the judge's findings are affirmed and adopted without modification.

II.

A. *Beverly Manor of Monroeville*

The Union[4] began organizing activities at this Pennsylvania facility in July 1986. Following an election on October 24, 1986, the Union was certified as the exclusive bargaining representative of the service and maintenance employees, including nurses aides. The parties began negotiations for a collective-bargaining agreement in December 1986 and reached agreement August 10, 1987.

On April 18, 1987, when probationary nurses aide Mary Vincent was discharged,[5] she sought the assistance of union organizer Ashley Adams. The following day, Adams telephoned Facility Administrator Lois Northey and requested a meeting with her to discuss Vincent's discharge. Northey told Adams that she would meet with Vincent, but would not permit Adams to be present. Adams testified that he reluctantly decided not to press the issue and set up the meeting between Vincent and Northey.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) through Northey's refusal to meet with Adams to discuss Vincent's discharge. The judge found, however, only that Northey's conduct reflected an antiunion bias. The General Counsel excepts to the judge's failure to find that Northey's refusal to meet with Adams is a refusal to discuss a grievance in violation of Section 8(a)(5) and (1). The Respondent argues that Northey did not refuse to meet with Adams inasmuch as Adams agreed not to participate in the

phone; the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing a new medical service plan and by unilaterally changing holiday and vacation benefits; the Respondent, through Facility Administrator Judith Comer and Director of Nursing (DON) Kay Sczublewski, created the impression of surveillance in violation of Sec. 8(a)(1); the Respondent violated Sec. 8(a)(1) when it hired security guards to prevent employees from distributing union literature during the campaign; (2) Fayette Health Care Center. The Respondent violated Sec. 8(a)(3) and (1) by disciplining Joann Clingan; the Respondent violated Sec. 8(a)(1), in addition to Sec. 8(a)(3), by giving employee Wilma Franks a less favorable performance evaluation; the Respondent, through Facility Administrator James Filippone, violated Sec. 8(a)(5), as well as Sec. 8(a)(1), when he assaulted employee delegate Wilma Franks when she was presenting grievances to him, and Union Representative Ashley Adams; (3) Mount Lebanon Manor Convalescent Center. The Respondent violated Sec. 8(a)(3) and (1) when it denied employee Diane Mead tuition reimbursement because of her activity on behalf of the Union; (4) Carpenter Care Center. The Respondent violated Sec. 8(a)(3) and (1) when it disciplined licensed practical nurse (LPN) Lynn Smith for failing to take disciplinary action against nurses aide Erica Evans; (5) Duke Convalescent Center. The Respondent violated Sec. 8(a)(1) when DON Joan Noble threatened employee Dixon that she would lose her job if she had meetings with the Union; (6) Four Chaplains Convalescent Center. The Respondent violated Sec. 8(a)(1) when it commissioned employee Precious Beasley to promote the Company's position about unionization and keep the Company posted on developments.

[3] In 1989 the Respondent reorganized its corporate structure and replaced the 5 operating divisions with 11 operating regions.

[4] District 1199P, National Union of Hospital and Health Care Employees, AFL–CIO.

[5] The General Counsel has excepted to the judge's dismissal of the allegation that the Respondent discharged Vincent in violation of Sec. 8(a)(3) and (1). For the reasons stated by the judge, we find no merit in the General Counsel's exception.

meeting.[6] We find merit in the General Counsel's exception.

An employer is obligated under Section 8(d) to meet and discuss grievances presented by the collective-bargaining representative in a sincere effort to resolve the grievance, notwithstanding the absence of a collective-bargaining agreement incorporating a grievance procedure. *Storall Mfg. Co.*, 275 NLRB 220, 221 (1985), enfd. 786 F.2d 1169 (8th Cir. 1986). The record supports the judge's finding that Adams, who had been arrested for trespassing at the facility during the recently concluded organizing campaign and faced with Northey's response that she would meet only with Vincent alone, reluctantly opted not to press the issue in the interest of seeing the meeting go forward.[7] The record also reveals that Adams accompanied Vincent to the facility but waited in his car, and that Vincent again unsuccessfully requested Adams' presence at the meeting. Under the circumstances, the Respondent's argument that Northey merely stated a preference for meeting alone with Vincent and did not refuse to meet with Adams is without merit. Accordingly, we find that Northey's refusal to meet with Adams constitutes a violation of Section 8(a)(5) and (1).

B. *Fayette Health Care Center*

The union[8] organizing campaign at this Uniontown, Pennsylvania facility began in June 1986. Following an election, the Union was certified as the exclusive bargaining representative of the service and maintenance employees on December 3, 1986.

In March 1987, while the parties were in the process of negotiating their first collective-bargaining agreement, Union Representative Ashley Adams prepared what he called ''problem-solving forms'' on which the employees could document problems and present them to management. In mid-March 1987, union delegate Patricia Ritz, a nurses aide at the facility, completed three forms and asked the ADON to give them to Facility Administrator James Filippone.[9] Filippone admits that he looked at them, tore them up, and gave them back to the ADON, instructing her to tell Ritz that ''[he] will not have this shit in the building.''

The judge found that, although Filippone's conduct constituted ''ungentlemanly behavior,'' it did not rise to the level of an unfair labor practice and dismissed the allegation. The General Counsel argues that Filippone's conduct constituted a refusal to consider grievances in violation of Section 8(a)(5) and (1). We find merit in the General Counsel's exception.

As discussed above, an employer's obligation under Section 8(d) to meet and discuss grievances is not confined to circumstances in which the parties have embodied a negotiated grievance procedure in their collective-bargaining agreement.[10] The Respondent does not dispute that Ritz was an employee representative of the Union or that the grievances submitted by her were legitimate. Rather, the Respondent argues that Filippone merely refused to recognize the *form* on which the grievances were submitted but did not refuse to address the underlying grievances.

Filippone's response to the grievances submitted by Ritz did not draw the fine distinction urged on us by the Respondent. In fact, Filippone admits the events as found by the judge, and the record discloses that it was some time after he had returned the forms to the ADON with his ''ungentlemanly'' message that he was told by Human Resources Representative Hugh Gregg to respond to the grievances. Thus there is no merit to the Respondent's argument that Filippone did not refuse to discuss the grievances but merely objected to the form on which those grievances were written.

We find, therefore, that the Respondent violated Section 8(a)(5) and (1) when Administrator Filippone tore up and returned the problem-solving forms submitted to him by Ritz.

C. *Claystone Manor*

The judge found that the Respondent violated Section 8(a)(3) and (1) when it discharged nurses aide Denise Kirven on March 19, 1987. The Respondent has excepted to this finding. For the reasons set forth below, we find that the Respondent would have discharged Kirven even absent her union activity and therefore dismiss this allegation.[11]

The Union[12] began organizing this facility, located in Ennis, Texas, in the fall of 1986. Kirven was very active in the Union's organizing efforts, which ended unsuccessfully when the Union lost the election on December 19, 1986.[13]

On March 19, 1987, Acting DON Beth Howze terminated Kirven for insubordination and for spreading false and malicious rumors about Howze and others, including an accusation that Howze was a witch who

[6] The Respondent excepts to the judge's characterization of Northey's conduct as antiunion bias. In view of our finding below, it is unnecessary to pass on the Respondent's exception.

[7] Adams' reluctance may also be attributable to the fact that he had been arrested several times during the recently concluded election campaign for trespassing at the facility.

[8] District 1199P, National Union of Hospital and Health Care Employees, AFL–CIO.

[9] The problems Ritz addressed on the forms concerned broken coffeepots, the facility code of conduct and the disciplinary point system, and the stocking of linen carts.

[10] *Storall Mfg. Co.*, supra.

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] Service Employees International Union, Local 606, AFL–CIO.

[13] The Respondent has not excepted to the administrative law judge's finding that Kirven was unlawfully disciplined and threatened by then-DON Jajuana Brunk when Kirven's picture appeared on a prounion flyer in November 1986.

practiced witchcraft on the patients. The judge found that this reason for Kirven's discharge ''was so silly that no reasonable person could believe she was fired for that reason'' and concluded that Kirven had been discharged for her union activity in violation of Section 8(a)(3) and (1).

The Respondent contends that the judge ignored Kirven's prior instances of insubordination toward Howze and others and relied inappropriately on the witchcraft allegation. The Respondent argues that two other incidents of insubordination, on January 5 and 6, in addition to the four counselling sessions Howze had with Kirven in the weeks before her discharge and complaints about Kirven from other employees, warranted the Respondent's action. We find merit in the Respondent's exception.

On January 5, 1987, Kirven was issued a warning for insubordination by Steve Maxey, then the activities director at the facility, when she became ''belligerent'' toward him and told him he was exceeding his authority. The following day, January 6, 1987, Kirven was written up by ADON Tim Massey, also for insubordination.[14] Kirven was unaware of the existence of the January 5 and 6 warnings.

On February 27, Kirven received a warning for patient neglect. Her receipt of this warning prompted Kirven to review her personnel file whereupon she discovered the warnings dated January 5 and 6. Kirven then called a ''hot line'' to corporate headquarters to complain that she had not seen the warnings in her file and asked that Human Resources Manager Roger Everett return her call. He never did.

The judge found that the only legitimate warning in Kirven's file was the written warning given to Kirven on February 27 for patient neglect. He apparently disregarded the two prior incidents of insubordination on January 5 and 6 because Kirven had not been informed that she had been written up. We note, however, that Kirven did not deny the conduct for which she received the January 5 and 6 warnings, but stated that she did not recall the incidents. Thus, while we agree that the Respondent should have apprised Kirven of the warnings, we cannot say that they were not legitimately given.[15]

Regardless of these warnings, the record discloses that the Respondent would have discharged Kirven even absent her union activity. Howze testified that she had spoken to Kirven about performance-related matters on four occasions in the weeks prior to Kirven's discharge on March 19. On two occasions, shortly after Howze became DON on March 1, 1987, she spoke to Kirven about patients who had not been shaved, bathed, or cleaned. Kirven's response on both occasions was to apologize and say she would try to do better. On the third occasion, however, Howze called Kirven into her office and told her that the patients were not being cared for. Kirven responded by slamming her hand on Howze's desk and said, ''you stay out of my face, you stay off my case. You don't tell me what to do. I'll do it when I get time to do it and if you're going to watch me do it, I won't do it.'' Howze testified that she did not write Kirven up for the outburst but chose instead ''to give her a chance.''

The fourth incident occurred just a few days before Kirven was discharged. Howze again called Kirven into the office and stated that she had talked to Kirven too many times before and that Kirven had to do her work. Kirven kicked the wall and said, ''Fuck you. Kiss the red part of my ass. You don't tell me what to do. You're not my boss, Steve [Maxey] is my boss and Steve will tell me what to do.'' Then Kirven left the office and slammed the door behind her. Kirven did not testify about these incidents.

Howze went immediately to Steve Maxey's office. Maxey, who had been the facility's activity director, was serving as acting administrator during the illness of Administrator Mahoney. Howze told Maxey of the incident and said she wanted to write Kirven up. Maxey persuaded Howze not to discipline Kirven and said he would talk to her.

Viewed in this context, the events of March 18 provided ample justification for Kirven's discharge. On that morning Howze overheard Kirven telling four other aides that Howze was a wicked old witch who practiced witchcraft on her patients and other employees. A short time later Howze saw Kirven coming out of Maxey's office. According to Howze, Kirven looked at her and said, ''I just got you in trouble'' and rolled her eyes. When Howze asked her to explain herself, Kirven ignored her and walked away. Howze returned to her office to find another nurses aide, Anne Toney, there to complain that she (Toney) had overheard Kirven spreading malicious rumors about her to another employee. Howze wrote the warning and decided to fire Kirven after reviewing her file.

The judge improperly relied only on the witchcraft incident to conclude that the Respondent's discharge of Kirven was pretextual. The union campaign ended in defeat on December 19, 1986, and there is no indication that Howze, who made the decision to terminate Kirven, was aware of Kirven's activities at the time.

[14] Massey testified that he asked Kirven to check the patients on her floor, because state health department inspectors were conducting an inspection of the facility. Kirven told him to ''quit hassling me. My hallway's okay. There's not any problem with it.'' When Massey asked her to cooperate and double check anyway, Kirven threw her clipboard on the nurses station desk and stomped away. The health department found several violations on Kirven's floor.

[15] Maxey testified that he wrote Kirven up on January 5 because he was told to do so by the acting DON, Tim Massey, but had intended to remove it from her file after speaking with Administrator Mahoney.

We note that Howze, a newcomer to the facility in November 1986, was a charge nurse during the campaign, worked on a shift different from that of Kirven, and did not participate in any management discussions concerning the Union. Howze became ADON at the end of January 1987 and was promoted to DON on March 1, 1987. All the incidents between Howze and Kirven occurred in the roughly 3-week period during which Howze, as DON, supervised Kirven.

On the basis of the unrebutted testimony of Howze, therefore, we find that the Respondent would have discharged Kirven even absent her union activity and dismiss this allegation of the complaint.[16]

D. *Torrington Extend-A-Care Nursing Home*

The Respondent purchased this facility in 1987 and, with some modifications, adopted the existing collective-bargaining agreement, including a provision to reopen negotiations on wages, in the spring of 1988. Pursuant to this provision, the Union[17] submitted its wage proposal and the parties began negotiations on June 3, 1988.

The Respondent's negotiator, Labor Relations Representative George Ulrich, began the June 3 session by rejecting the Union's proposal as too high and launched into a lengthy speech on the Respondent's financial condition. In particular, Ulrich stated that the Respondent ''was not going under but was having trouble staying afloat,'' and told the Union that people were being laid off nationwide and that vice presidents were being demoted. In addition, Ulrich gave the Union several newspaper articles and press releases which portrayed the Respondent as being in financial trouble, and told the Union that virtually all the Respondent's facilities were up for sale. Ulrich followed this dismal assessment of the Respondent's financial condition with a proposal for a wage freeze.

The Union responded by requesting information concerning Beverly's financial condition, including cash flow and income statements and balance sheets from October 1985. In addition, the Union requested documents reflecting the amount the facility spends monthly on ''pool nurses''[18] broken down by hourly rate and agency fee. (Facility Administrator Chris Smith had promised to turn over the ''pool nurses'' information at the June 3 meeting.) The Respondent refused to provide any of the requested information.

The judge found that the Respondent, through Ulrich, had pleaded the ''functional equivalent of inability to pay'' when he discussed Beverly's financial condition at the June 3 meeting. Citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the judge therefore concluded that the Union's request for financial information was appropriate and that the Respondent violated Section 8(a)(5) and (1) by refusing to turn over the requested information.[19]

The Respondent excepts to the judge's finding that it violated Section 8(a)(5) and (1) by refusing to turn over the requested financial information. The Respondent argues that the judge's finding cannot stand in the face of Ulrich's specific denial that he was claiming that the Respondent was unable to pay the Union's proposed wage increase. Rather, the Respondent argues, Ulrich did no more than present evidence of the Respondent's difficult financial times in support of his good faith in proposing a wage freeze. We find merit in the Respondent's exception.

In *Nielsen Lithographing*, 305 NLRB 697 (1991), we recently had occasion to consider the obligation of an employer to disclose financial information of the kind sought here in light of the Supreme Court's decision in *Truitt* and the Board decisions which followed. In *Nielsen* the union sought financial information to verify the company's claim, made during negotiations, that it was at a competitive disadvantage and needed concessions in employee compensation and benefits. The company maintained that, while it was still making a profit, it needed concessions in order to compete because the costs of the contract were resulting in a significant loss of business to competitors, and that trends indicated that, in the future, labor cost items would force higher prices. Id.

In *Nielsen* we held that an employer who claims only economic difficulty or business losses or the prospect of layoffs, as opposed to a present or prospective inability to pay during the life of the contract being negotiated, is not obligated under Section 8(d) to disclose financial data to support its claim. We thus adhered to the Board's interpretation of *Truitt* that distinguishes between employer's claim that it cannot pay and claims that it does not want to pay,[20] and declined to adopt a broader interpretation that would require the production of financial information whenever an employer puts its financial condition in issue by justifying its bargaining proposals on grounds of objectively verifiable claims of unfavorable financial trends that could result in job losses. On the record of that case, we concluded that the company had indicated an unwillingness, as opposed to an inability, to pay increased wages during the life of the contract being negotiated

[16] See *Wright Line*, supra.

[17] At the time, the employees were represented by Torrington Extend-A-Care Employee Association. The Association affiliated with District 1199, National Union of Hospital and Health Care Employees, AFL–CIO on September 30, 1988.

[18] Pool nurses are nursing staff employees hired on a per diem basis through a temporary staffing agency.

[19] The judge did not order a remedy for the violation, however, in view of the fact that the parties had reached agreement on a new collective-bargaining agreement.

[20] See *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965), enfd. sub nom. *Teamsters Local 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966); *E. I. DuPont & Co.*, 276 NLRB 335 (1985); *Advertisers Mfg. Co.*, 275 NLRB 100 (1985).

and thus was not obligated under Section 8(d) to produce the requested financial data.

In this case, as in *Nielsen*, the Respondent's negotiator, Ulrich, painted a rather bleak picture of the Respondent's financial condition and referred generally to people being laid off ''nationwide.'' Nothing Ulrich said at the June 3 meeting, however, could fairly be read by the Union as a claim that the Respondent *could not* pay the proposed wage increase. Indeed, on the record here the most that can be said about Ulrich's presentation is that the Respondent was not as profitable as it once had been. Thus, under the circumstances of this case, we conclude that the Respondent did not violate Section 8(a)(5) and (1) by refusing to provide the Union with the requested financial information.

The Respondent also contends that it was not obligated to provide the Union with the information concerning ''pool nurses'' because the Union did not adequately and contemporaneously explain the relevancy of its request.[21] The record discloses that, at the June 3 bargaining session, the Union's negotiator, Ruth Pudla, asked the Respondent to provide the state reimbursement rates and the per diem rates charged to the Respondent by the temporary agencies which provide nurses to the facility on a per diem basis. That same day, the facility administrator, Chris Smith, gave Pudla a copy of the reimbursement rates and agreed to provide the pool nurses information. Pudla testified without contradiction that, at the end of the session, she reminded Ulrich and Smith to provide the pool nurses information as soon as possible and, when the information was not forthcoming, included the item with her request for financial data.

The Respondent now argues that it was under no obligation to provide the information concerning pool nurses because the Union had not specified the relevancy of the information at the June 3 meeting. We disagree.

An employer is obligated to furnish requested information where the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out. *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979). We find that the circumstances surrounding the request for pool nurses information put the Respondent on notice of the relevance of the requested information.

Pool nursing staff perform bargaining unit work at the facility at a rate, the Union suspected, that was higher than the Respondent paid to bargaining unit employees. It seems obvious, therefore, that the Union was seeking to bolster its proposed wage increase by persuading the Respondent to reduce its demand for pool nurses by attracting and keeping regular staff with higher wages. Furthermore, the facility administrator, without objection from Ulrich, readily agreed to provide the information during the June 3 session, apparently recognizing the obvious relevance of the information to the negotiations at hand.

Even at the second negotiating session on June 17, after the Respondent had received the Union's information request, Ulrich did not dispute the relevance of the pool nurses information. He merely denied that Smith had the authority to bind the Respondent and stated that he had to discuss the request with his superiors. Thus, contrary to the Respondent's assertions, we find that the relevance of the pool nurses information was readily apparent from the context of the negotiations and that the Respondent was on constructive, if not actual, notice of such relevance.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the pool nurses information it requested.[22]

III.

The judge recommended that a broad order apply to, and the notice accordingly be posted at, all the Respondent's facilities nationwide, and not be limited to the 33 facilities in which violations were found in this case. In recommending the broad corporatewide order, the judge considered the 15 prior reported cases which have come before the Board[23] and more than 100 meritorious cases filed between 1983 and 1986, which have been the subject of formal or informal settlement.

[21] See *Emery Industries*, 268 NLRB 824, 825 (1984); *Adams Insulation Co*., 219 NLRB 211, 214 (1975).

[22] The cases cited by the Respondent (*Emery Industries*, supra, and *Adams Insulation Co*., supra) are not to the contrary, for each of those cases involved broad requests for information the relevance of which was not readily apparent from the surrounding circumstances.

We agree with the judge, however, that we need not order the Respondent to turn over the particular requested pool nurses information in view of the fact that the parties have reached agreement on the contract.

[23] The following *Beverly* cases are:

1. *Beverly Manor Convalescent Centers*, 242 NLRB 751 (1979), enf. denied and remanded 661 F.2d 1095 (6th Cir. 1981), reaffd. 264 NLRB 966 (1982), remanded 727 F.2d 591 (6th Cir. 1984), reaffd. 275 NLRB 943 (1985).
2. *Beverly Manor Convalescent Hospital*, 247 NLRB 391 (1980), enfd. 659 F.2d 1089 (9th Cir. 1981).
3. *Beverly Manor Convalescent Hospital*, 250 NLRB 355 (1980).
4. *Hillview Convalescent Center*, 266 NLRB 758 (1983).
5. *Beverly Enterprises*, 272 NLRB 83 (1984).
6. *Beverly Manor of Reading*, 276 NLRB No. 125 (1983), rescinded by unpublished Board Order January 9, 1986.
7. *Maple Grove Convalescent Home*, 274 NLRB 1102 (1985).
8. *Cumberland Nursing Center*, 263 NLRB 428 (1982).
9. *Hale Nani Health Center*, 279 NLRB 242 (1986).
10. *Leisure Lodge*, 279 NLRB 327 (1986).
11. *Parkview Gardens Care Center*, 280 NLRB 47 (1986).
12. *Fountainview Place*, 281 NLRB 26 (1986).
13. *Provincial House Living Center*, 287 NLRB 158 (1987).
14. *Beverly Manor of Monroeville*, 286 NLRB 1084 (1987).
15. *Fayette Health Care Center*, 286 NLRB No. 105 (1987) (not reported in Board volumes).

He found that the Respondent has demonstrated a proclivity to violate the Act and has engaged in such widespread and egregious conduct as to demonstrate a general disregard for the employees' fundamental statutory rights.[24] In determining that the extraordinary remedy was appropriate, the judge also considered the Respondent's admitted single-employer status with all its facilities and the fact that managers above the facility level were involved in all the union organizing campaigns and collective-bargaining negotiations.

A. *The Positions of the Parties*

The Respondent seeks to limit the scope of the remedy to the individual facilities involved in this litigation, contending that a broad corporatewide order is beyond the scope of the Board's remedial authority under Section 10(c) and that it is punitive in nature. The Respondent also argues that the judge based his extraordinary remedy solely ''on the numbers'' and failed to consider the relatively small number of facilities involved, the absence of geographic proximity among the facilities at issue, the relatively small number of employees involved, and the allegedly punitive impact of the order on the Respondent's other 950 homes.[25]

The Respondent argues that a corporatewide order is improper where, as here, there is no evidence that any manager above the facility level orchestrated the conduct found to be unfair labor practices or that the Respondent disseminated the conduct to other facilities in an effort to chill the employees' exercise of their Section 7 rights at those facilities. Thus, the Respondent argues that the corporatewide order penalizes the Respondent for its efforts to control and train facility managers to conform to the requirements of the Act. The Respondent further argues that the remedy is designed, not to remedy the unfair labor practices found, but to deter future violations, and is thus punitive in nature. Finally, the Respondent argues that a corporatewide order effectively denies the Respondent its statutory right to seek appeal of representation issues because of the threat that a corporatewide contempt citation would issue.

In support of the broad corporatewide order, the General Counsel contends that the Respondent has demonstrated a proclivity to violate the Act by its conduct found to be unlawful in this litigation, including ''hallmark'' violations of threats of job loss and other retaliatory action for employee union activities during organizing campaigns. Furthermore, the General Counsel argues that the extraordinary remedy is warranted in view of the Respondent's seeming pattern of discharging union proponents, during or after union organizing campaigns, and by the Respondent's display of what the General Counsel calls ''a pattern of prolonged and repeated resistance to the obligations of good-faith collective bargaining.''[26] Finally, the General Counsel argues that the Respondent's centralized control of labor relations necessitates such extraordinary relief, noting that human relations representatives were dispatched from its division or corporate headquarters to serve as ''campaign managers'' at the facility in response to union organizing activity, and that labor relations representatives were dispatched to serve as chief spokespersons for the Respondent in all dealings with the various Unions that were certified or recognized as collective-bargaining representatives of its employees.

B. *The Appropriate Remedy*

As noted above, this consolidated case concerns violations which occurred primarily over a 2-year period from the summer of 1986 through the spring of 1988. During that period the Respondent committed some 135 unfair labor practices at 32 of the 35 facilities here at issue. For the reasons set forth below, we find, in agreement with the judge, that the Respondent has demonstrated a proclivity to violate the Act and that a broad corporatewide cease-and-desist order will best effectuate the purposes of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979); *UARCO, Inc*., 286 NLRB 55 (1987). See also *J. P. Stevens & Co*., 247 NLRB 420 (1980); *Florida Steel Corp*., 244 NLRB 395 (1979), reversed and remanded 646 F.2d 616 (D.C. Cir. 1981), reaffd. 262 NLRB 1460 (1982), enfd. in pertinent part 713 F.2d 828 (D.C. Cir. 1983); *S. E. Nichols, Inc*., 284 NLRB 556 (1987), enfd. 862 F.2d 952 (2d Cir. 1988).

The Respondent admits that it is a single employer with all its operating divisions and individual facilities, and the record discloses that the Respondent exercises centralized control over labor relations policies at the facilities. To that end, the Respondent centrally prepares employee handbooks to be distributed to employ-

[24] *Hickmott Foods*, 242 NLRB 1357 (1979).

[25] The Respondent also contends that the judge improperly relied on the 15 prior reported Board cases, 9 of which it claims involved solely representation issues and subsequent tests of certification, and 2 others which it claims involved either de minimis violations or such limited conduct as to warrant narrow cease-and-desist orders. Further, the Respondent argues that the judge improperly considered the ''over 100 meritorious cased filed against the Respondent between 1983 and 1986'' as in violation of the General Counsel's agreement not to rely on those cases in this litigation.

While we note that the Respondent itself introduced the list of settled cases as an exhibit in the litigation, we do not rely on them in our determination that the Respondent has shown a proclivity to violate the Act so as to justify the broad remedy here.

[26] The General Counsel argues that this pattern is ''characterized by delaying tactics in contract negotiations and grievance handling matters, a persistent refusal to provide clearly relevant and necessary information, a refusal to execute an agreed-upon contract, and unilateral changes.''

ees at the facilities and, for facility management's use, a manual containing personnel policies and procedures. The record establishes that the Respondent has instructed its facility managers to inform it of the first sign of union organizing activity at the facility, on which the Respondent dispatches a human relations representative from division headquarters to act as the Respondent's campaign manager for the duration of the union organizing drive. Furthermore, the record shows that labor or industrial relations representatives, based at the Respondent's division headquarters, served as chief negotiators at all collective-bargaining negotiations, responded to all requests for information, and handled all grievances above the second step.

It cannot be said, however, that each division conducted its own separate and distinctive labor relations policy. Thus, the record shows that management representatives in contract negotiations or grievance resolution above the second step received their instructions not only from vice presidents at the division level, but also from the national corporate headquarters.[27] Furthermore, labor relations representatives frequently were transferred from one division to another. For example, Abe Emery testified that he worked as a labor relations representative in nearly all the Respondent's divisions.[28]

The Respondent contends, however, that the guidance from above—for example, the human resources representatives dispatched at the first sign of organizing activities to serve as campaign managers—should count in its favor, rather than serve as a basis for a nationwide order. This guidance was provided, it argues, only to ensure that facility management personnel ran lawful campaigns. Whatever might be said for this defense if we were presented with a pattern of generally lawful campaigns and subsequent good-faith bargaining in those instances in which the unions were certified as the employees' bargaining representatives, it does not suffice here. What emerges from this record is a pattern of unlawful resistance to organizing campaigns—some 120 unfair labor practices committed in the course of responding to union organizing campaigns at 23 facilities—and repeated resistance to its obligation to deal with a collective-bargaining representative in good faith at those facilities in which unions won elections and those facilities with incumbent Unions at the time the Respondent acquired them.[29]

The unfair labor practices committed in response to organizing campaigns included unlawful no-solicitation/no-distribution rules, threats, promises or grants of benefits, interrogations, surveillance of union activities, and imposition of more onerous working conditions in retaliation for employees' support of the union. Most notably, the Respondent used disciplinary measures or discharges to punish employees for their union support either during the organizing campaigns or shortly after elections. In particular, 27 employees at 11 facilities were unlawfully discharged, refused rehire, or removed from their jobs for their activities on behalf of the Union. At least 14 employees at various facilities were the recipients of unlawful disciplinary or retaliatory actions because they supported efforts to organize their facilities. Regardless whether the retaliatory measures occurred during the heat of the campaign or shortly after elections, the Respondent conveyed the message to employees that it will not tolerate union activity at its facilities and that those who exercise their statutory right to seek and support a collective-bargaining representative will be dealt with severely.

As noted, the Respondent's disregard for its employees' statutory rights continued in its dealings with the collective-bargaining representatives selected by its employees. Both at facilities in which a union had won the election in spite of the Respondent's unlawful resistance, and those in which there was a union incumbent when the Respondent acquired the facility, the Respondent engaged in such forms of bad-faith bargaining as refusal to process grievances, refusal to provide information relevant and necessary to the Union's performance of its collective-bargaining responsibilities, and refusal to execute a collective-bargaining agreement. In several facilities, the Respondent punished employee negotiators or those seeking the assistance of their bargaining representative with unlawful discharges or other discipline.[30]

As noted earlier, the numerous unfair labor practices were not solely the actions of individuals at the facility level acting independently. Some of the unfair labor

[27] For example, Judith Mollinger, the Respondent's labor relations representative for the Heritage and Eastern Divisions who acted as chief negotiator for several facilities involved in this litigation, testified that she and two of her colleagues from other divisions reported directly to Labor Relations Supervisor Ken Sanders in Chicago. The other two labor relations representatives reported to Supervisor Steve Ronillo in Texas. Sanders and Ronillo reported to the corporate head of labor relations, Jim Paxton, in California.

[28] The division lines, themselves, were fluid. For example, the Heritage Division was merged with the Eastern Division in February 1987. Staff of the former Heritage Division were either laid off (as in the case of Judith Mollinger) or transferred to the Eastern Division (as in the case of Hugh Gregg).

[29] At the other nine facilities at which violations were found, the Respondent enjoyed existing collective-bargaining relationships with the Unions.

[30] For example, the Respondent unlawfully discharged employee Joyce Garmon less than 2 weeks after she argued with the Respondent's corporate supervisor for labor relations, Steve Ronillo, at the negotiating table for Colonial Nursing Home. Similarly, while negotiations were underway at the Respondent's North Park facility, it unlawfully transferred Mabel Dart, and unlawfully disciplined Joyce Kircher, both members of the negotiating committee. At Meyersdale Manor the Respondent unlawfully disciplined a member of the negotiating committee and at Pond Point it discharged a probationary employee for complaining to a steward about working conditions.

practices were committed by agents of the Respondent from division or corporate headquarters, and even in the case of those committed by facility supervisors, it is clear that few were carried out without at least the knowledge of managers above the facility level, if not their direct involvement and approval.

For example, Heritage Division[31] Human Resources Representative Hugh Gregg threatened employees with discharge and made good on the threat when he discharged 17 employees at the Fayette Health Care Center for wearing union buttons just days before the election and Heritage Division Vice President Ken Cess threatened employees at Beverly Manor of Monroeville that ''if they thought things were bad now, they should vote for the Union and they would see how bad it could get.''[32] When Gregg discharged the so-called ''Fayetteville 17,'' he consulted first with George Putnam, the Heritage Division vice president for human resources, who approved the discharge. At Carpenter Care Center, the administrator told an unlawfully discharged employee that, ''if it were up to them, her [unblemished work performance] record would count but that it was out of [their] hands.''[33] Also at that facility, the administrator told an employee that, because she was a 10-year employee, the chairman of the board in California would have to approve her discharge; he proceeded to unlawfully suspend her instead. At other facilities, the administrators testified that they had consulted with their regional managers in determining that employees should be discharged.

Finally, virtually all the violations of Section 8(a)(5) were committed directly by labor relations representatives, dispatched from the divisions, and other managers above the facility level. As noted above, all bargaining was conducted by the labor relations representatives, and all requests for information were forwarded directly to them. In some cases, officials from corporate headquarters themselves ruled on the information requests, refusing to provide the information until forced to do so.

The Respondent seeks to minimize the significance of the ample evidence of division-level and headquarters responsibility for the unfair labor practices found here by arguing that its facilities are spread out across the nation and that a large portion of the violations found in this case occurred at facilities in Pennsylvania and Michigan. This argument does not persuade us that only an order confined either to the particular facilities involved here or to those two geographic areas is appropriate. We note first, as did the judge, that facilities from all the Respondent's geographic divisions were involved either in this litigation or in a prior case.[34] That most of the violations have occurred in Pennsylvania and Michigan may well be explained by the fact that it was primarily the employees at those facilities who sought to exercise their right to organize. The evidence, noted above, of frequent managerial transfers among divisions and labor relations guidance from corporate headquarters is a sufficient indication that, if undeterred, the Respondent will continue its pattern of unlawful conduct in response to union activity wherever it may occur among the Respondent's 850 facilities which have yet to be the locus of organizing campaigns.[35] Thus, there is no reason to await evidence that reports of the Respondent's demonstrated hostility to the exercise of Section 7 rights have been disseminated to facilities where employees have not yet sought to exercise such rights. A broad corporatewide order is appropriate now to ensure that all those employees may exercise their rights, if they so choose, without retaliation from the Respondent's managers.

Finally, we find no merit in the Respondent's argument that the corporatewide order effectively denies the Respondent its statutory right to seek appeal of representation issues. Contrary to the Respondent's assertion, the decision to institute a contempt proceeding rests finally with the Board,[36] not the General Counsel, and it is not our intention that this order foreclose the Respondent from nonfrivolous efforts to seek judicial review of Board decisions in representation cases. In any event, the Respondent's suggestion that the General Counsel would seek contempt for a technical 8(a)(5) challenge of the Board's representation decision ''given [the General Counsel's] underlying rationale in this proceeding'' is entirely speculative. A review of the Annual Reports of the National Labor Relations Board for fiscal years 1985 through 1989 reveals no case in which the Board has sought contempt in a technical 8(a)(5) representation case, nor has the Respondent directed our attention to any such case.

[31] As noted above, the Heritage Division was merged with the Eastern Division in February 1987.

[32] These examples are by no means exhaustive, nor can the Respondent argue that they are isolated instances not reflective of the Respondent's policies. In a prior case involving a union organizing campaign at one of the Respondent's facilities in the Southern Division, the director of personnel for that division interrogated employees, solicited grievances, threatened employees with discharge, created the impression of surveillance, unlawfully disciplined an active union supporter, and discriminatorily denied maternity leave. *Beverly Enterprises*, 272 NLRB 83 (1984).

[33] The administrator testified that, when he made the decision to terminate the employee, he had consulted with a division official.

[34] See *Beverly Enterprises*, supra.

[35] See *NLRB v. Lummus Co*., 210 F.2d 377, 381 (5th Cir. 1954); *NLRB v. Mine Workers District 2*, 202 F.2d 177, 179 (3d Cir. 1953); *NLRB v. Salant & Salant, Inc*., 183 F.2d 462, 465 (6th Cir. 1950).

[36] *Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board* (effective Apr. 1, 1955), 20 Fed.Reg. 2175 (1955) (''[T]he General Counsel will initiate . . . contempt proceedings pertaining to the enforcement of or compliance with any order of the Board only upon approval of the Board.'')

In sum, the remedy we impose is not punitive, nor is it inconsistent with prior Board decisions in which the employers have engaged in a prolonged course of unlawful conduct designed to thwart their employees' free exercise of their Section 7 rights.[37] It is designed specifically to address what this and earlier litigation[38] reveal to be the Respondent's pattern of thwarting union organizing campaigns and otherwise disregarding the fundamental statutory rights of its employees with a gamut of unfair labor practices. It will best effectuate the policies of the Act and protect the fundamental statutory rights of workers at other facilities.

Accordingly, we adopt the recommendation of the judge and order the Respondent to comply with the terms of this order at all its facilities nationwide.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Enterprises, Pasadena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline or more onerous working conditions because of their union activity or other concerted protected activity.

(b) Threatening employees with loss of benefits if they select a union to represent them.

(c) Threatening employees with discharge because of their union activity or other protected concerted activity.

(d) Threatening employees with reprisal for testifying at a Board hearing.

(e) Threatening to close or sell a facility if the employees select the Union as their collective-bargaining representative.

(f) Threatening to withhold a wage increase because employees selected the Union as their collective-bargaining representative.

(g) Threatening employees that if they engage in a strike, they will not be permitted to visit close relatives who are residents at the facility.

(h) Threatening employees with the futility in selecting a union.

(i) Forbidding or attempting to forbid employees from engaging in lawful solicitation or distribution on behalf of a union on or off its property and during nonworking time or in nonwork and/or nonpatient care areas.

(j) Transferring employees to less desirable positions because of their activities on behalf of the Union.

(k) Promising increased wages or benefits to induce employees to defeat or decertify the Union.

(l) Refusing to provide tuition reimbursement or other benefits to employees because of their activities on behalf of the Union.

(m) Forbidding or restricting the activities of employee union representatives in nonwork and/or nonpatient care areas.

(n) Interrogating employees with regard to their union activity or the union activity of others.

(o) Engaging in surveillance of employees' union activities or creating the impression of such surveillance among employees.

(p) Discharging employees or imposing any disciplinary measures on employees including suspensions, written warnings, oral warnings, or transfers because of their activities on behalf of or support for a union or their participating in other concerted protected activity.

(q) Issuing less favorable performance evaluations because of their support for or activities on behalf of a union.

(r) Failing and refusing to bargain in good faith with a union selected by a majority of its employees as their collective-bargaining representative.

(s) Unilaterally implementing changes in terms and conditions of employment of employees without prior notice to or affording an opportunity to bargain to the Union selected as their collective-bargaining representative.

(t) Failing and refusing to supply any union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(u) Failing and refusing to meet and bargain with a union representing its employees concerning employees complaints and grievances.

(v) Assaulting union representatives or delegates.

(w) In any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different facilities if necessary), without prejudice to their seniority and other rights and privileges, the following employees:

> Erika Evans (Carpenter Care Center), Lucille Lucas (Duke Convalescent Center), Patricia Chroninger (Beverly Manor of Reading), Suzanne La Framboise (Meyersdale Manor), Jeraldine Bubna (North Park Manor), Precious Beasley (Four Chaplains Convalescent Center), Linda Johnson (Provincial House Total Living Center), Kim King (Adrian Health Care Center), Yvonne Murine (Faith Haven Health Care Center), Elias

[37] See, e.g., *J. P. Stevens & Co.*, supra; *Florida Steel*, supra.

[38] *Provincial House Living Center*, 287 NLRB 158 (1987); *Parkview Gardens Care Center*, 280 NLRB 47 (1986); *Leisure Lodge*, 279 NLRB 327 (1986); *Beverly Enterprises*, supra.

Pierre and Nicole Pierre (East Village Nursing Home), Vicky Buker (Pond Point Convalescent Center), Shirley Niswonger (Ridgeview Manor Nursing Home), Janet Glenn, Debra Wiley and Maggie Roper (Sycamore Village Nursing Home), Joyce Garmon (Colonial Park Nursing Home).

(b) Make whole, commencing from the date of their unlawful discharge or suspension as the case may be, the employees listed in 2(a) above, the 17 employees unlawfully discharged on September 15, 1986, but later rehired at Fayette Health Care Center, and Marie Meadow (Carpenter Care Center), Leonnette Curry (Four Chaplains Convalescent Center), Deborah Altemus (Richland Manor), and Charisee Bryant (Ridgeview Manor Nursing Home) for any loss of pay and other benefits suffered by them as a result of the discrimination practiced against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Remove from its files any references to the discharges of the persons listed in 2(a) above and the unlawful disciplinary actions taken respectively against Josephine Belice and Debbie Savelli (Beverly Manor of Monroeville); Joann Clingan (Fayette Health Care Center); Elaine Dukes (Mount Lebanon Manor Convalescent Center); Marie Meadow, Pamela Newell, and Lynn Smith (Carpenter Care Center); Patricia Spangler (Meyersdale Manor); Joyce Kircher (North Park Manor); Immacula Joseph and Elias Pierre (East Village Nursing Home); Malcom Campbell (Belleville Nursing Home); and Denise Kirven (Claystone Manor) and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

(d) Make whole, with interest, employee Diane Mead for its unlawful denial of tuition reimbursement.

(e) Make whole, with interest, those employees at Parkview Gardens Care Center adversely affected by the unlawful implementation of the vacation buyout program.

(f) On request, furnish to the applicable Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(g) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with any Union selected by its employees as their collective-bargaining representative.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or other moneys due under the terms of this Order.

(i) Post at all its facilities (which numbered 992 as of the last day of hearings on December 13, 1989, but which may be more or less at the time posting is required) copies of the attached notice marked ''Appendix.''[39] Copies of the notice, on forms provided by the Regional Director for Region 6 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the representation elections at Four Chaplains Convalescent Center and Parkview Manor Nursing Home be set aside and that new elections be ordered and conducted by the Regional Director for Region 7 and Region 30, respectively, whenever the latter desires it to be appropriate.

MEMBER OVIATT, dissenting in part.

I agree with my colleagues in all respects, except for the scope of the remedy. They adopt the judge's recommendation for a remedial order embracing every facility in the nation owned by the Respondent, as urged by the General Counsel. The Respondent contends that this case involves nothing out of the ordinary and that the Board should limit the order strictly to those facilities in which violations of the Act have been found thus far. I believe neither approach appropriately tailors the remedy to the violations found.

I would grant an order embracing all facilities within the Respondent's Eastern Division and those individual facilities in other divisions in which unfair labor practices have occurred. In addition, I would apply the order to the activities of Eastern Division Human Resources Representative Hugh Gregg, regardless of the division in which he works.[1]

During a 2-year period, from summer 1986 through spring 1988, the Respondent committed 135 unfair labor practices at 32 of the 35 facilities covered in the complaint. The Respondent instructed its facility managers to inform it of the first sign of union organizing activity at the facility. The Respondent then dispatched

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] I would include in the Eastern Division those facilities that became part of it pursuant to a merger with the former Heritage Division in February 1987.

a human resources representative from division headquarters to act as the Respondent's campaign manager for the duration of the union organizing drive. Similarly, labor or industrial relations representatives based at the Respondent's division headquarters served as chief negotiators at all collective-bargaining negotiations, responded to all requests for information, and handled all grievances above the second step.

Hugh Gregg, the human resources representative of the Heritage Division (later merged into the Eastern Division), threatened employees with discharge and did discharge 17 employees at the Fayette Health Care Center in Pennsylvania for wearing union buttons just days before the election. In addition, Heritage Division Vice President Ken Cess threatened employees at Beverly Manor of Monroeville, also in Pennsylvania, that ''if they thought things were bad now, they should vote for the Union and . . . see how bad it could get.'' Before Gregg discharged the so-called ''Fayette 17,'' he consulted with Heritage Division Vice President for Human Resources George Putnam, who approved the discharge.

In numerous instances, Eastern Division facility administrators consulted with division officials before unlawfully discharging or otherwise disciplining employees. Virtually all of the 8(a)(5) violations were committed directly by labor relations representatives dispatched from the division headquarters and other managers above the facility level.

Although it is true that facilities from all the Respondent's geographic divisions were the subject of unfair labor practice findings in this litigation or in a prior case, in this proceeding most of the violations occurred in the Respondent's Eastern Division. Thus, of the 32 facilities at which violations were found, 22 are in the Eastern Division. The remaining 10 facilities where unfair labor practices occurred in this case are scattered among 8 other States.

Given the extensive participation of the Eastern Division management in the unfair labor practices, I believe that, if undeterred, the Respondent will continue its pattern of unlawful conduct in response to union activity wherever it may occur among the Respondent's Eastern Division facilities, including those facilities that have yet to be the locus of organizing campaigns.[2] In addition, in my view, the administration of all the Eastern Division facilities by managers who have been directly involved in the commission of many of the widespread and substantial unfair labor practices in this case means that employees at all Eastern Division facilities are now very likely aware of the Respondent's unlawful efforts in the Eastern Division to defeat the Union—or will likely be made aware of those efforts as an object lesson of what happens should they choose or consider a union. In any event, I find it reasonable in light of the widespread violations to make this aspect of the remedy coextensive with the Eastern Division managers' authority. An order encompassing the former Eastern Division is plainly appropriate.

In one other respect, I would extend the order beyond all the Eastern Division facilities and those individual facilities in other divisions in which unfair labor practices were committed. Hugh Gregg, human resources representative in the former Heritage Division, who was expressly named in several complaint allegations, was personally involved in the commission of numerous serious unfair labor practices found here. Because managers from one division may transfer to another, I would make the cease-and-desist provisions of the order applicable to Gregg, as the Respondent's agent, regardless of the division in which he works. This represents a modest, but appropriate, expansion of the order which, like all standard Board orders, is already binding on all the Respondent's officers and agents within the covered facilities.

As is obvious from the foregoing, I do not agree with the Respondent that this is a run-of-the-mill case and that the usual cease-and-desist order limited to the facilities which suffered the direct impact of the unfair labor practices will suffice. Within the Eastern Division, the unfair labor practices were sufficiently widespread and divisional management's involvement in their commission sufficiently direct to require more broadly based relief. On the other hand, I do not agree with the majority that the unfair labor practices were sufficiently extensive outside the Eastern Division to warrant a nationwide order.[3] Of the facilities where unfair labor practices were found in this proceeding, only 10 of 32 were outside the Eastern Division. Those 32 facilities are but a small percentage of the nearly 1000 nursing homes and extended care facilities the Respondent owns and operates throughout the United States. The Board in prior cases has, it is true, found that the Respondent violated the Act. In consideration of the small percentage of facilities involved in this proceeding, however, those previous violations are not enough in my opinion to warrant a nationwide order.

In sum, I believe an order limited to all the facilities in the former Eastern Division, to those individual facilities in other divisions where violations occurred, and to Hugh Gregg, no matter in which division he works, would most appropriately remedy the Respondent's unfair labor practices.[4]

[2] See *NLRB v. Lummus Co.*, 210 F.2d 377, 381 (5th Cir. 1954); *NLRB v. Mine Workers District 2*, 202 F.2d 177, 179 (3d Cir. 1953); *NLRB v. Salant & Salant, Inc.*, 183 F.2d 462, 465 (6th Cir. 1950).

[3] Cf. *NLRB v. Ford Motor Co.*, 119 F.2d 326 (5th Cir. 1941); *Greenfield Mfg. Co.*, 199 NLRB 756, 757 fn. 7 (1972).

[4] See *S. E. Nichols, Inc.*, 284 NLRB 556, 560 (1987), enfd. 862 F.2d 952 (2d Cir. 1988); *Delchamps, Inc.*, 244 NLRB 366, 378 (1979), enfd. 653 F.2d 225 (5th Cir. 1981); *J. P. Stevens & Co.*, 157

Continued

NLRB 869, 878 (1966), enfd. as modified 380 F.2d 292 (2d Cir. 1967).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with these rights. More specifically:

WE WILL NOT threaten employees with discipline or more onerous working conditions because of their union activity or other concerted protected activity.

WE WILL NOT threaten employees with loss of benefits if they select a union to represent them.

WE WILL NOT forbid or attempt to forbid employees from engaging in lawful solicitation or distribution on behalf of a union on or off our property and during nonworking time or in nonwork and/or nonpatient care areas.

WE WILL NOT interrogate employees with regard to their union activity or the union activity of others.

WE WILL NOT engage in surveillance of employees' union activities or create the impression of such surveillance among employees.

WE WILL NOT discharge employees or impose any disciplinary measures on employees including suspensions, written warnings, oral warnings, or transfers because of their activities on behalf of or support for a union or because they engaged in other protected concerted activity.

WE WILL NOT issue employees less favorable performance evaluations or deny tuition reimbursement because of their support for or activities on behalf of a union.

WE WILL NOT fail or refuse to bargain in good faith with a union selected by a majority of our employees as their collective-bargaining representative.

WE WILL NOT unilaterally implement changes in terms and conditions of employment of employees without prior notice to or affording an opportunity to bargain to the Union selected as their collective-bargaining representative.

WE WILL NOT fail or refuse to supply any union representing our employees, on request, with information necessary and relevant to its collective-bargaining functions.

WE WILL NOT fail or refuse to meet and bargain with a union representing our employees concerning employees' complaints and grievances.

WE WILL NOT assault union representatives, delegates, or stewards.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights protected by the National Labor Relations Act.

WE WILL offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different facilities if necessary), without prejudice to their seniority and other rights and privileges, the following employees:

> Erika Evans (Carpenter Care Center), Lucille Lucas (Duke Convalescent Center), Patricia Chroninger (Beverly Manor of Reading), Suzanne La Framboise (Meyersdale Manor), Jeraldine Bubna (North Park Manor), Precious Beasley (Four Chaplains Convalescent Center), Linda Johnson (Provincial House Total Living Center), Kim King (Adrian Health Care Center), Yvonne Murine (Faith Haven Health Care Center), Elias Pierre and Nicole Pierre (East Village Nursing Home), Vicky Buker (Pond Point Convalescent Center), Shirley Niswonger (Ridgeview Manor Nursing Home), Janet Glenn, Debra Wiley and Maggie Roper (Sycamore Village Nursing Home), and Joyce Garmon (Colonial Park Nursing Home).

WE WILL make the employees listed in the paragraph immediately above and the following employees: The 17 employees unlawfully discharged on September 15, 1986, but later rehired at Fayette Health Care Center, Marie Meadow (Carpenter Care Center), Leonnette Curry (Four Chaplains Convalescent Center), Deborah Altemus (Richland Manor), Charisee Bryant (Ridgeview Manor Nursing Home) whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharge or suspension plus interest.

WE WILL remove from our files any references to the discharges of the persons listed above and the disciplining of Josephine Belice and Debbie Savelli (Beverly Manor of Monroeville); Joann Clingan (Fayette Health Care Center); Elaine Dukes (Mount Lebanon Manor Convalescent Center); Marie Meadow, Pamela Newell, and Lynn Smith (Carpenter Care Center); Patricia Spangler (Meyersdale Manor); Joyce Kircher (North Park Manor); Immacula Joseph and Elias Pierre

(East Village Nursing Home); Malcom Campbell (Belleville Nursing Home); and Denise Kirven (Claystone Manor) and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

WE WILL make whole, with interest, those employees at Parkview Gardens Care Center adversely affected by our unlawful implementation of the vacation buy-out program.

WE WILL, on request, furnish to the applicable Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

WE WILL, on request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with any union selected by our employees as their collective-bargaining representative.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

Barton Meyers, Esq., Kim Siegart, Esq., Richard Wainstein, Esq., Tim Brown, Esq., Joseph P. Canfield, Donna M. Canada, Charles F. Morris, Jim Walter, Ronald S. Cohen, Esq., Michael Marcionese, Esq., Michall T. Jamison, Esq., Richard J. Simon, Esq., Everett Rotenberry, Esq., Benjamin Mandelman, Esq., Ruth Small. Esq., Bruce E. Buchanan, Esq., Naomi L. Stuart, Esq., James E. Horner, Esq., and *Catherine M. Roth, Esq.*, for the General Counsel.

Roger D. Meade, John Kyle, Thomas Dowd, Howard Cole, and *Benjamin Hahn. Esqs. (Littler, Mendelson, Fortiff & Tichy)*, of Baltimore, Maryland, and *Philip E. Berlin, Esq. (McKenna & Cuneo)*, of Los Angeles, California, for the Respondent.

Reuben A. Guttman and *Larry Englestein Esqs*., of Washington, D.C., and *John G. Adams, Esq*., of Southfield, Michigan, for the Service Employees International Union, Charging Party.

Gail Lopez-Henriquez, Esq. of Philadelphia, Pennsylvania, for the National Union of Hospital and Health Care Employees, AFL–CIO, Charging Party.

DECISION

Introduction

MARTIN J. LINSKY, Administrative Law Judge. This consolidated case involves numerous allegations of unfair labor practices at 35 nursing homes in 14 different States. All 35 nursing homes were, at the time of the unfair labor practice allegations, owned and operated by Beverly California Corporation. Beverly owns approximately 1000 nursing homes across the country. When the litigation began Beverly owned over 1100 nursing homes spread among 5 operating divisions. When the hearing ended in December 1989 Beverly owned 992 nursing homes spread among 11 different regions since Respondent had done away with its 5 operating divisions and replaced them with 11 operating regions. Single employer status was admitted by Respondent, i.e., Beverly California Corporation and its operating subdivisions regions, etc., and individual facilities are a single employer.

The chain of command in each facility is basically the same. The administrator is in charge. He or she is usually not a medical professional but could be. Second in command is the director of nursing (DON) and third is the assistant director of nursing (ADON). These DONS and ADONS are usually registered nurses (RNs) but sometimes are licensed practical nurses (LPNs). There are usually LPNs and nursing aides or assistants at each facility. There is usually a maintenance department, a laundry department, and a dietary department, each of which is headed by a supervisor.

I find that unfair labor practices were committed by Respondent at 33 of the 35 facilities in the litigation and I further conclude that to remedy this widespread pattern of unfair labor practices it will be necessary, in addition to the usual remedies of cease-and-desist orders, reinstatement with backpay, orders to bargain in good faith, etc., that I recommend to the Board that notices that Beverly and many of its facilities violated the National Labor Relations Act (the Act) be posted in all of Beverly's approximately 1000 facilities and that the order to cease and desist run to all of Beverly's approximately 1000 facilities. In other words a so-called nationwide order.

This case was initially assigned to Judge Benjamin Schlesinger. He held 3 days of hearings in October and November 1987. These hearings addressed scheduling and subpoena compliance. Massive amounts of documents were subpoenaed and prior to this case being reassigned to me in the late summer of 1988 Respondent had admitted single employer status.

After I was assigned to the case a number of facilities were added to the litigation. Eventually the number of separate facilities in the litigation totaled 35. Two of the facilities, i.e., Carpenter Care Center and Beverly Manor of Reading, both in Pennsylvania, had two separate cases. There were a total of 37 separate cases. In all there were 78 days of hearings before me starting on September 26, 1988, and ending on December 13, 1989. Hearings were held in 13 different States and the District of Columbia. Over 270 witnesses testified and over 900 exhibits, in addition to formal papers, made their way into the record. Two of the cases, i.e., the ones involving Parkway Manor Health Care Center in Minnesota and Parkview Gardens Care Center in Iowa will be decided on the basis of stipulated records.

I will address the allegations at each of the 35 facilities separately and then proceed to discuss in some further detail my recommended Order and the content of the notice which I will recommend be posted at each and every one of Beverly's approximately 1000 nursing homes.

In making the findings of fact and conclusions of law recited below I considered the entire record in this case, to include posthearing briefs filed on June 1, 1990, by the General Counsel and Respondent, and my personal observation of the witnesses and their demeanor. Respondent admitted it is an employer under the Act and it further admitted that the Unions involved were all labor organizations within the meaning of the Act.

I. BEVERLY MANOR OF MONROEVILLE, MONROEVILLE, PENNSYLVANIA; TRIAL ON SEPTEMBER 26, 27, 28, AND 29, 1988; CHARGING PARTY IS DISTRICT 1199P

A. *Overview*

It is alleged that numerous unfair labor practices were committed at this facility beginning in July 1986 at the beginning of a union organizing campaign and continuing through the election, which the Union won, and extending into the period following certification of the Union as the collective-bargaining representative of the employees.

Eventually the parties reached agreement on a contract and a collective-bargaining agreement, effective August 10, 1987, to October 24, 1988, was signed.

On July 23, 1986, union organizer Ashley Adams, a full-time employee of District 1199P, went to the facility and told the administrator that he was demanding recognition for both a unit of service and maintenance employees, which included nursing aides, and for a unit of licensed practical nurses (LPNs). His request for recognition was denied.

Adams was accompanied by several employees from the units to be represented. The administrator called the police and had Adams charged with trespass. Adams was later convicted of noncriminal trespass before a magistrate but the conviction was reversed on appeal. The fact that Adams received a summons for trespass was introduced to show antiunion animus on Respondent's part and is not alleged as a separate unfair labor practice.

Thereafter, Adams and employees handbilled in front of the facility. On September 24, 1986, 2 days before the election in the service and maintenance unit, Adams and a number of employees were handbilling in front of the facility. Three management representatives, the new administrator, Judy Comer, DON Ray Sczublewski, and Human Resources Representative Laura Garvey were present. Comer and Garvey were wearing antiunion buttons. Adams stayed on public property. Thereafter, the Union won the election among the service and maintenance employees and was certified by the Board on 24 October 1986.

Subsequent to the election, which the Union won, but prior to certification, Respondent unilaterally and without prior notice to the Union implemented a new medical treatment service plan for its employees, implemented a new procedure for the granting of holiday leave, and implemented a new absenteeism policy. On October 30, 1986, Ashley Adams wrote to Administrator Comer protesting these unilateral changes in terms and conditions of employment. He received no response to his letter. Negotiations for a contract began in mid-December 1986.

On April 18, 1987, an active union supporter, Mary Vincent, was fired. Adams contacted the new administrator, Lois Northey, who had succeeded Judy Comer, to see what could be done about getting Vincent's job back. Northey would not meet with Adams about Vincent's discharge but only with Vincent alone. Adams reluctantly agreed not to press the issue and Vincent and Northey met with no union representative present. There was no collective-bargaining agreement in effect at the time, therefore, no grievance-arbitration clause in effect which might have mandated union participation. Northey's attitude clearly reflects an antiunion bias.

B. *Discharge of Mary Vincent*

The discharge of Mary Vincent, a probationary employee, is alleged to be an unfair labor practice. Vincent was fired on April 14, 1987. In early April she had met with Ashley Adams at her home and signed a union authorization card. She spoke in favor of the Union at work and also spoke about the problem of short staffing with the ADON Shirley Neuschwander and about what she (Vincent) believed to be a problem of poor patient care at the facility. She had previously told her coworkers she was going to do so. Short staffing, i.e., working with less workers than needed, was a matter of great concern to the employees and involved the contention held by many of the employees that there was too much work and too few workers.

Vincent was fired by DON Sczublewski for insubordination and failing to follow through on assignments. More specifically, her failure on April 14, 1987, to turn a patient for several hours to prevent bed sores, leaving another patient in a wet bed, being late in giving food to yet another patient, and when confronted with these failings speaking in a loud and insubordinate manner to a supervisor.

Her discharge was reviewed by Administrator Lois Northey at Adam's request a few days after the discharge. Northey spoke with Vincent and concurred in the decision to discharge.

DON Sczublewski, who was herself fired in June 1987, testified that she personally observed Vincent being insubordinate to the charge nurse who was reprimanding her for failing to properly care for her patients. The DON made the decision to terminate. The DON claims she didn't know of Vincent's union activity. The charge nurse was so upset over her confrontation with Vincent that she was in tears. Vincent testified at the hearing that if she was derelict in the performance of her duties it was because she was busy helping other nursing aides. She concedes that she had been told in the past to do her own work and to attend to her own patients.

In light of the following facts: Vincent's union activity was minimal, the person who fired her (the DON) didn't know of her union activity, she has no defense to the misconduct of failing to attend to her patients, the election, which the union won, was held several months *prior* to Vincent even being hired, and Vincent was a probationary employee, I must conclude that Vincent was *not* fired in violation of the Act, i.e., because of her union and other protected concerted activity.

Then Administrator Northey, who credibly testified that she is an ex-Beverly employee and that she hates Beverly, met with Vincent. There is no evidence that persuades me that Northey refused to reverse the decision to terminate Vincent because of Vincent's involvement with the Union.

C. *The Disciplining of Josephine Belice and the Change in Practice Regarding Use of the Phone for Personal Use*

In August 1986—during the union organizing campaign—Josephine Belice, a nursing aide, was issued an oral warning for improper use of the phone. Belice had signed a union authorization card on July 13, 1986, and was an active union supporter. She attended five or six union meetings and she spoke in favor of the Union among her fellow employees. She was present with Ashley Adams when he confronted the

management of the home on June 23, 1986, and demanded recognition of the Union as the collective-bargaining representative for the service and maintenance unit. When the demand for recognition was made Administrator Comer told the group, which included Adams and Belice and a number of other employees, that if they didn't leave she would call the police.

Belice worked nights, i.e., 11 p.m. to 7 a.m. At 5:30 a.m. she would routinely call her young daughter at home on the facility phone. Her purpose was to make sure her daughter got up for school. Belice's supervisor, Lou Ann Harris, had, before the union organizing campaign, seen Belice do this many times. Harris had also seen other aides use the phone to call out for lunch. Harris herself even called out for lunch over the facility phone. Harris was admitted by Respondent to be both a supervisor and an agent.

Lou Ann Harris orally reprimanded Belice for using the phone one morning as Belice was calling home to wake up her daughter. LPN John Wilson witnessed this reprimand and credibly testified that Harris told Belice that with the Union around Respondent would be cracking down on the employees. The oral warning was verbal only and not reduced to writing.

Harris told Belice no more phone calls because the facility was now going by the book because of all the union activity.

LPN Anne Maringo would call her daughter at night for a ride home. In August both the administrator and DON told employees that they could no longer use the facility phone for personal calls because it was too expensive. Employees had to use pay phones in the lobby. I note that Lorraine Platko credibly testified to widespread use of the facility phone for personal calls prior to the crackdown. RN Supervisor Eleanor Chadwick knew of it and said nothing.

The employee handbook provides that no personal phone calls are allowed from the facility phone unless it is an emergency or the person who makes the call has prior approval of a supervisor to do so but the practice at the facility was to permit the employees to use the phone. The practice was changed and this benefit taken away for and because of the union organizing campaign. It was an unfair labor practice for Respondent to modify the phone policy by stricter enforcement of it because of the union activity of its employees and it was an unfair labor practice to orally reprimand Belice for her use of the phone. *Mississippi Chemical Corp.*, 280 NLRB 413, 418 (1986). It was punishment of Belice and the others simply because they engaged in protected concerted activity.

D. *Imposition of More Onerous Working Conditions*

On or about September 24, 1986, 2 days before the election, Ken Cess, a vice president for operations, in a meeting with employees—one of whom was Josephine Belice—told the employees, among other things, that if they thought things were bad at the home now they should just vote yes for the Union and things will get worse. Cess never testified. His statement was a clear cut threat to employees that if they exercised their lawful right to vote to be represented by a union they would be sorry. This was an unfair labor practice in violation of Section 8(a)(1) of the Act. Laundry Assistant Betty Gessinger credibly testified that Cess said, ''[I]f you think we're SOB's now wait until the union gets in.'' This is an unlawful threat intended to coerce employees in the exercise of their right to select representation by the Union or reject such representation. Cess said words, to the effect, that the employer would hover over the employees, catch them in a mistake, and fire them. *G.E.'s Trucking*., 252 NLRB 947, 950 (1980).

E. *Change in Benefits*

On September 29, 1987, after the Union won the election but before certification, Office Manager Kathy Eaton told a group of employees, which included Josephine Belice, that they would henceforth get the full vacation benefit (10 days after 1 year of work, 15 days after 5 years of work, and 20 days after 10 years of work) *if* and *only if* they missed no scheduled days of work for any reason whatsoever. For every 3 days of work that the employee missed for any reason they would lose 1 day of vacation. Prior to this an employee's amount of vacation and the number of absences had nothing to do with one another. Obviously, the employees would not be paid if they didn't work but the absences from work had no effect on the length of their vacation.

On October 5, 1986—after the Union won the election but before certification—DON Kay Sczublewski announced a new absenteeism policy. The holiday policy was also changed after the election but before certification. Henceforth if an employee wanted to be off on a holiday from work it was done on a first come, first served basis rather then on the basis of seniority which had been the practice.

These unilateral changes after the election but before certification were done to punish the employees for voting to be represented by the Union and constitute unfair labor practices since there is no evidence these changes were made because of compelling economic consideration. *Angelica Healthcare Services*, 284 NLRB 844, 852 (1987); *W. A. Krueger Co*., 299 NLRB 914 (1990).

F. *Surveillance of Employees*

Back in July 1986, a week or more before Ashley Adams demanded recognition from then Administrator Comer, LPN John Wilson was visited at his home by Adams. Adams gave Wilson some union authorization cards to get signed. Wilson, who signed a card himself, went to the facility with some union papers in his breast pocket. Comer, apparently seeing union materials in Wilson's pocket, asked him if the union organizer had been at the nursing home. Wilson said no but he had been at his (Wilson's) home.

Wilson got off work the following morning and was waiting for his ride in the facility parking lot. Administrator Comer and DON Sczublewski exited the facility and entered a station wagon. They sat in the station wagon, waiting. After a while they got out of the station wagon and Administrator Comer approached Wilson and asked him what was he doing in the parking lot. This clearly created in Wilson's mind an impression that he was under surveillance because of possible union activity on his part. This is an unfair labor practice. The election in the LPN unit was held on January 12, 1987. The Union won.

G. *Prohibiting Employees from Handing out Union Literature*

On September 24, 1986, 2 days before the election in the service and maintenance unit, nursing assistant Shirley

Valkanas was told by two security guards, hired by Respondent, that she was not allowed to handbill on company property. It is a violation of the Act for agents of Respondent to prevent an employee (as distinguished from a nonemployee) from handing out leaflets. There was no evidence presented that the handbilling was causing a litter problem or impeding traffic in or out of the grounds of the facility. Both DON Sczublewski and Human Resources Representative Garvey were present when the employees were told they could not leaflet on Respondent's property. *Orange Memorial Hospital Corp.*, 285 NLRB 1099, 1100 (1987); *Tri-County Medical Center*, 222 NLRB 1089 (1976).

H. *Disciplining of Anne Maringo*

LPN Anne Maringo was an active union supporter, e.g., she signed an authorization card, passed out authorization cards in the lobby of the home when Ashley Adams requested Comer to recognize the Union as collective-bargaining representative for the LPNs. She wore a union button at work until ordered to remove it.

During the week of August 25, 1986, Maringo was working hard in an area where patients could not observe her. She was not wearing her nurses cap. She says DON Sczublewski asked her where her cap was? LPNs and RNs were supposed to wear nursing caps while on duty. Nurses' aides did not wear caps. Maringo told the DON that she was real busy. Maringo says the DON then said, ''well I guess I'll have to give you an oral warning.'' DON Sczublewski, who is no longer with Respondent (she was fired, as noted above) testified credibly that she had absolutely no recollection of having said to Maringo what Maringo claims she said. The former DON concedes that she often told nurses, if she saw them without a cap on, to put their caps on. I do not consider this disciplining someone. Maringo never received anything in writing in connection with this incident. Hence, I find no violation of the Act.

I. *Disciplining of Debbie Savelli*

Debbie Savelli, who left Respondent's employ in November 1987, was a nursing assistant on the 3 to 11 p.m. shift. She was prounion and had signed a union authorization card. Savelli regularly called home from the phone at the nurses' station to check on her husband and children. She would only take a minute or so to do so. Management officials had observed her do it. Nothing was ever said.

On July 30, 1986, Savelli was openly calling home in the presence of DON Sczublewski when a call light went on at the nurses station indicating she should attend to a resident. Savelli left to attend to the resident. The very next day she was called into the DON's office and given an oral warning, which was reduced to writing, for using the facility phone in violation of the handbook, i.e., no permission from a supervisor and not an emergency call. Savelli was not aware of this policy until she got the reprimand.

The DON testified she heard Savelli talking on the phone at the nurses station about her daughter's upcoming music recital. She claimed she knew nothing of Savelli's union activity. The crux of the matter is that Respondent cracked down on phone calls in order to discourage union activity and the DON in disciplining Savelli, I am firmly convinced, did so to persuade the employees to resist the union because if they didn't life will be hell. Accordingly, I conclude that the oral warning of Savelli was done to discourage the employees from wanting to become unionized and was violative of Section 8(a)(3) of the Act.

J. *Events Subsequent to Certification of the Union*

The parties' first negotiation session was held on December 18, 1986. The Union was only representing the service and maintenance unit at this time. On February 19, 1987, the Union and Respondent met again. The parties were to meet on March 16, 1987, but on March 15, 1987, Judy Mollinger, the chief negotiator for Respondent for this facility and a number of others, called to cancel the meeting because she had been in an accident and couldn't drive for several days. Indeed, she had passed out at the wheel of her car while driving and was lucky she was not more seriously injured or even killed. Her car flipped over and she was suspended upside down held in by her seatbelt. Neurological testing followed in an effort to find out why Mollinger passed out. Mollinger was told by her doctor not to travel. Mollinger's office was in Rockville, Maryland, a suburb of Washington, D.C., and approximately 5 hours by car from Monroeville, Pennsylvania, the site of this facility.

Mollinger was supposed to get someone to take her place at the negotiations table but was unsuccessful because people she tried to get to take her place were too busy with their own work. Eventually, meetings were held on April 24 and 25, 1987. The parties agreed to meet again in early June 1987, and to confirm that meeting in May. The parties met in May and June. By early June it was clear the parties could reach agreement on a contract. They agreed on a firm schedule. Both sides stuck to that schedule and a contract was agreed to on August 10, 1987. Between certification of the Union in October 1986 and agreement on a contract in August 1987 the parties met a total of 10 or 11 times. They met in every month but March due to Respondent's inability to meet caused by their chief negotiator having been in a serious car accident. This does not constitute a failure by Respondent to bargain in good faith. The delay, while unfortunate, was not excessive under the circumstances. I note that Respondent is a major corporation and could have and maybe should have put in a replacement negotiator for Mollinger, who was going to be unavailable due to her accident, but the delay was not so excessive that its failure to do so violated its duty to bargain in good faith.

K. *Refusal to Meet with Union Representative to Discuss Grievance of Betty Gessinger*

Active union supporter Betty Gessinger's hours were changed in August 1987. This was subsequent to a collective-bargaining agreement being reached but before written copies of the contract were distributed. Gessinger complained to her immediate supervisor, Fred Bartoletti, about the change. He said there was no union contract and Ashley Adams (the union representative) can't help you. That very day she brought her complaint to the attention of then Administrator Lois Northey, who within 20 minutes straightened out the matter to the complete and total satisfaction of Gessinger. At no time did Gessinger file a written grievance. Respondent committed no unfair labor practice under these

facts or if it did so it was so de minimis as not to justify a conclusion of unlawful conduct.

II. FAYETTE HEALTH CARE CENTER, UNIONTOWN, PENNSYLVANIA; TRIAL ON OCTOBER 3, 4, 5, 6, AND 7, 1988; CHARGING PARTY IS DISTRICT 1199P

The union organizing campaign began in late June 1986 when an organizer for District 1199P, Thomas DeBruin, received a first phone call from an employee trying to bring in the union. After 70 percent of the employees had signed union authorization cards DeBruin and a number of employees went unannounced to the facility and spoke with Administrator Jim Filippone. DeBruin demanded that the Union be recognized. Filippone said he couldn't do that and said the request for recognition had to be sent to Rockville, Maryland. The following day the Union filed a petition for an election. An election among a unit of service and maintenance employees was scheduled for September 19, 1986.

A. *Discharge of Fayette 17*

On September 15, 1986, 4 days before the election, 17 employees were discharged for engaging in activity on behalf of the Union, i.e., wearing union buttons. Respondent admits it violated the Act in discharging what became known in this litigation as the Fayette 17.

On January 5, 1987, the 17 unlawfully discharged employees were offered full reinstatement to their former positions and paid back wages for the period between unlawful discharge and offers of reinstatement. If there are disputes concerning the payment of backpay this can be resolved during the compliance stage of this litigation. Needless to say it was a violation of Section 8(a)(3) of the Act for the so-called ''Fayette 17'' to be discharged for engaging in protected concerted activity.

B. *Failure to Bargain in Good Faith*

The Union won the election to represent the service and maintenance employees and was certified by the Board on December 3, 1986. The first negotiating session was on January 14, 1987, and the second on February 3, 1987. On February 3, 1987, Respondent's representatives, led by July Mollinger (who was from out of town) and Jim Filippone who lived in the area, showed up almost 4 hours late for the session. The union side—organizer Tom DeBruin and several employees—waited 4 hours for Respondent. Respondent could have but chose not to inform the Union that it would be starting late due to travel problems encountered by its chief negotiator, July Mollinger. This act of extraordinary discourtesy rises to the level of an unfair labor practice in violation of Section 8(a)(5) when one considers all the other indignities heaped on the Union and its supporters by Respondent. Respondent violated the Act by being late and deliberately not notifying the Union that it would be late. To add insult to injury Respondent was to bring to this session information on vacation policy, health insurance, and the position description for ''ward clerk.'' Since an LPN held the ''ward clerk'' position it was debatable whether this job belonged in the service and maintenance unit or not. Respondent brought none of this requested information to the meeting. This is bad-faith bargaining in violation of Section 8(a)(5) of the Act.

C. *Unilateral Changes*

After the February 3, 1987 negotiating session Respondent unilaterally and without prior notice to the Union changed its policy on employees having food or drink in their work area. Henceforth, they were not allowed to have food or drink in their work area. This is an unfair labor practice. Respondent admits it made the change unilaterally and without prior notice to the Union but claims it had an inherent managerial right to do so. I disagree. A nurses's right to have a cup of coffee while sitting at the nurses station filling out charts is not an insignificant right but a condition of employment. Beginning on February 17, 1987, Respondent unilaterally and without prior notice to the Union discontinued its practice of providing free coffee to its employees. While Respondent may argue that putting in a coffee vending machine where employees pay for their coffee rather than providing free coffee is an insignificant change in benefits not unlike a company no longer furnishing a free turkey at Thanksgiving or Christmas but I must disagree. The furnishing of a benefit on a daily basis, i.e., every single working day, is a significantly greater benefit then a once a year ''gift.'' In making these unilateral changes Respondent violated Section 8(a)(5) of the Act.

D. *Organizing Campaign*

On September 12, 1986, Respondent posted a notice which referred to the union organizing campaign and provided that no soliciting was permitted on facility property. Since this prohibition proscribes soliciting in both work and nonwork areas and prohibits employees from soliciting while on break or during lunch it was obviously overly broad and unlawful. The posting of the overly broad no-solicitation rule violates Section 8(a)(1) of the Act. The notice was posted for only a few hours according to employee Patricia Ritz, who saw it posted. The notice was removed by Respondent but employees were not told that they should ignore the notice.

E. *Disciplining of Joann Clingan*

Joann Clingan, a housekeeping aide, was active on behalf of the Union, e.g., she solicited fellow employees to sign union authorization cards, etc.

On August 27, 1986, Administrator Filippone and Hugh Gregg, an individual sent by higher headquarters within Respondent's organization to conduct Respondent's campaign against the Union, told Clingan not to solicit for the Union on the premises at any time and not to solicit employees at their homes. Fellow employee Wilma Franks was present at this meeting and corroborates Clingan.

Respondent knew Clingan was in favor of the Union. On October 2, 1986, following the election but before certification, Clingan was disciplined. She had seen that a commode in a resident's bathroom was clogged up with paper towels and human feces and could not be flushed. She informed the DON, Mary Ellen Gumbo, about this problem. Gumbo called the maintenance supervisor, Fred George. Clogged commodes are the responsibility of maintenance to correct. George came up on the floor, observed the condition of the commode, and told Clingan to fix it. Clingan yelled at George for not fixing the commode. Charge nurse Joyce Hoch asked Clingan what the problem was and Clingan told

her. Hoch got a nurses aide to unclog the commode. Clingan, a housekeeper, then proceeded to clean the bathroom.

Later that day, Clingan received an oral warning from her supervisor for being disrespectful to Maintenance Supervisor Fred George when she talked to him earlier in a loud and abusive fashion. Clingan was convinced the disciplinary warning form she received on November 11, 1986, was substantially different from the one she was shown on October 2, 1986, but not given. I think she is simply mistaken on this point. Respondent's written disciplinary forms are called employee memorandums. All disciplines are in writing and one of four boxes is checked off, i.e., oral warning, written warning, suspension, or discharge. The box marked ''oral warning'' was checked off in the case of Clingan. The issue is whether Clingan was disciplined because of her union activity or for some other reason. Fred George, the maintenance supervisor, did not testify. He was disciplined for his part in the argument with Clingan on October 2, 1986, and later terminated in December 1986.

Based on Filippone's extraordinary antiunion animus and the fact that he knew Clingan was prounion it is difficult to believe that this disciplinary warning was given for any reason other than Clingan's prounion activity. All Clingan did was loudly inform the maintenance supervisor to do his job. The beneficiary of him doing his job would be principally the residents of the facility who used that bathroom.

Nellie Stewart, housekeeping supervisor, who signed and showed the oral warning to Clingan on October 2, 1986, did not testify. Joyce Hoch, whom Clingan had asked to get Fred George to help on the clogged toilet problem, did testify but was asked no questions about the matter of Clingan's discipline.

F. *Failure to Consider ''Problem Solving Forms''*

Patricia Ritz submitted some ''problem solving'' forms which Ashley Adams had prepared based on information in the Beverly Handbook up the management chain of command for consideration. At a March 16, 1987 negotiating session Ritz was advised by Administrator Filippone that he had ripped up her ''problem solving'' forms and told her he did so because they don't mean ''Shit'' (his word). While this is crude and ungentlemanly behavior it doesn't rise to the level of an unfair labor practice. It does show, as do other instances, that Filippone is hot-headed and unusually antiunion.

G. *Incidents Involving Employee Wilma Franks*

Wilma Franks resigned from Respondent's employ in June 1987. She was one of the ''Fayette 17'' who had been unlawfully fired on September 15, 1986, and offered reinstatement on January 5, 1987. She was a very active prounion supporter. Among other things, she attend union meetings and passed out union literature.

On a daily basis Franks would speak to her supervisor and friend, Dietary Supervisor Carol Judd. They spoke on a daily basis during the union campaign in August and September 1986. Judd told Franks that if the Union were voted in the employees would lose benefits. Judd specifically referred to the stock purchase plan and the tuition reimbursement benefit as benefits employees would lose if the employees voted for union representation. I credit Frank's testimony. Judd did not testify. Even though Franks and Judd were friends when Judd spoke she spoke as if privy to inside information and appeared to be expressing more than her own personal opinion. This threat of loss of benefits if the employees vote for the Union violates Section 8(a)(1) of the Act.

On August 27, 1986, Franks was directed to attend a meeting with Jim Filippone and Hugh Gregg, Respondent's regional manager for human resources. She and three other employees were in attendance. Gregg told the employees Franks, Dennis Sylvester, Joann Clingan, and Sandy Silva—that they were not to solicit for the Union and they were not to talk about the Union anywhere in the building to include the employees' lounge. Filippone added that they were not to call fellow employees at home about the Union either. These are clear cut violations of Section 8(a)(1) of the Act. I credit Franks' testimony, which was supported by employee Joann Clingan, who I also found credible. Gregg did not testify. I do not believe Filippone's denial. He impressed me as a witness who would say anything if he thought it would help Respondent's position. He was simply not a credible witness.

Franks, like the others among the ''Fayette 17,'' returned to work in January 1987. On January 20, 1987, she received a performance evaluation from Filippone. Filippone said that Judd, who was no longer at this facility but at another Beverly facility, had prepared the evaluation. The evaluation stated, in part, that Franks ''has potential to become a good employee if outside influences are curbed.'' Franks asked what was meant by ''outside influences'' and Filippone said union activity. There are five possible ratings on Respondent's performance evaluation form. Franks overall rating was ''satisfactory'' which is higher than ''needs improvement'' and ''unsatisfactory'' but not as high as either ''outstanding'' or ''very good.'' She asked if her ''satisfactory'' rating would be ''outstanding'' but for her union activity and Filippone said yes. It is a violation of Section 8(a)(3) of the Act to give a less favorable performance evaluation to an employee because the employee engaged in protected concerted activity.

On March 20, 1987, Franks, who was now a union delegate (steward), went to Administrator Filippone's office to discuss a number of grievances to include her personal grievance over her hours being cut. Filippone, who as noted above has a problem with his temper, got so angry at Franks that he took his foot off the chair he had his foot on (he was standing at the time), picked up the chair, and threw it violently in Franks' direction. The chair did not hit Franks and I don't believe Filippone wanted to hit or injure Franks, but the chair Filippone violently threw in Franks' direction crashed into the chair right next to Franks. This violent behavior toward a union delegate and employee clearly violates the Act. Filippone's testimony is not credited nor is that of Supervisor Erna Tichner, who was present. Tichner claims that Filippone merely pushed one chair into another and did not throw the chair.

Franks filed a charge of harassment against Filippone with a local magistrate. Filippone was acquitted on that charge. I am, of course, not bound by the magistrate's findings.

H. *Physical Assault on Union Representative Ashley Adams*

On March 24, 1987, Ashley Adams—a full-time union employee and not a Beverly employee—went to the facility to see Administrator Filippone to complain about Filippone's conduct toward Wilma Franks recounted just above in section 2,G of this decision. He did not have an appointment.

Adams was accompanied by approximately eight employees to include Wilma Franks. Adams knocked on Filippone's door. Filippone came out of his office. He was furious with Adams for bothering him. He yelled, ''[W]hat do you want?'' Adams said he was there to discuss the Franks matter. Filippone walked right up to Adams and pointed a pen right in Adams' face. It was only inches away. Adams knocked the pen away and Filippone violently pushed Adams against the wall yelling, ''Don't ever knock a pen out of my hand.''

This assault by Filippone against Adams was done in the presence of a number of employees. This action by Filippone is the kind of physical violence that might tend to discourage an employee from exercising his or her right to join or assist a union. This is a violation of Section 8(a)(1) of the Act. Fortunately, Adams was not injured.

I personally observed both Filippone and Adams. Both men appeared physically fit and are young in appearance but Filippone is considerably taller and heavier. Filippone presents a much more physically imposing figure than Adams. With respect to the particulars of the physical encounter I believe Adams and not Filippone who claims he never even touched Adams. I also do not believe Donna Karol who claims she heard Adams say moments before the incident that he was going to provoke Filippone into hitting him. It is clear that Filippone has what is sometimes referred to as a ''short fuse.'' He even admitted on the stand that he has a bad temper.

Filippone filed charges of harassment against Adams and Adams, thereafter, filed charges of assault against Filippone. Filippone was acquitted before a magistrate whereas Adams was convicted of harassment and fined $75.

Needless to say what happened in the magistrate's court isn't binding on me. The burden of proof is different and the parties are different. I heard Adams and Filippone and there is no doubt in my mind that Filippone was the aggressor and physically manhandled Union Representative Adams in the presence of eight employees represented by Adam's union.

I. *Other 8(a)(1) Conduct During the Union Organizing Campaign*

Respondent admits that Administrator Filippone on September 11 and 17, 1986, and admits that Human Resources Regional Manager Hugh Gregg on September 11, 1986, during the union organizing campaign, threatened employees with discharge because of their activities on behalf of the Union.

Respondent admits that on August 27, 1986, Hugh Gregg threatened employees with more onerous working conditions if they selected the Union as their collective-bargaining representative.

The following supervisors on the date or dates indicated next to their name required employees to remove union buttons or insignia signifying support for the Union while allowing the wearing of nonunion-related buttons and insignia: Human Resources Regional Manager Hugh Gregg (September 11 and 15, 1986); Dietary Supervisor Carol Judd (September 14, 1986); Housekeeping Supervisor Nellie Stewart (September 11, 1986); DON Mary Ellen Gumbo (September 11, 1986); and Administrator Jim Filippone (September 11, 1986).

Respondent further admits that on or about September 11, 1986, Human Resources Manager Hugh Gregg prohibited employees from distributing union literature and soliciting on behalf of the Union in Respondent's parking lot. All of this conduct, which Respondent admits, violated Section 8(a)(1) of the Act.

J. *Discharge of Brenda Hatfield*

Brenda Hatfield was an LPN. She worked on the night shift, i.e., 11 p.m. to 7 a.m. She worked at this facility from August 1984 to June 15, 1987, when she was fired. She was very actively prounion and Respondent clearly knew it prior to their allegedly discriminatorily changing her schedule so that she no longer got every third weekend off and when it allegedly unlawfully fired her because of her union activity.

Hatfield was the LPN who was most active in seeking to get the Union to represent the LPNs. In August 1986 there was a 4-day NLRB hearing on the issue of whether LPNs were supervisory personnel or not. The eventual conclusion by the Board being that they were not supervisors. In any event Hatfield was one of three LPNs who testified for the Union at that hearing.

Thereafter, her schedule was changed. She did not get every third weekend off between late August 1986 and January or February 1987. It is alleged that this change of schedule was because of her union activity. The evidence at the hearing, however, reflects to the contrary. Because of vacations, etc., it was necessary to modify Hatfield's schedule. She later got back in the routine of every third weekend off. There was no violation of the Act.

Hatfield's disciplinary record was, to be polite, less than good. Prior to the Union being on the scene at all Hatfield had been written up for absenteeism.

After the union organizing campaign began Hatfield was disciplined with written warnings on February 15 and March 25, 1987, under Respondent's progressive disciplinary system for being absent on September 15 and November 11, 1986, January 2, February 17 and 20, and March 20, 1987. On March 6, 1987, she was given an oral warning for leaving the med cart (a cart which contained medicines) unlocked in violation of policy. On March 9, 1987, she was given an oral warning for failing to note on a patient's chart that the patient had been found lying on the floor by an aide. Hatfield admits her guilt, if you will, of all of these offenses.

On March 9, 1987, she also received a written warning for leaving the med cart in an unauthorized place, i.e., the patients' lounge. Her defense to this misconduct is that others did the the same thing on occasion and she did not think it was prohibited. It was prohibited however and any reasonable person would assume so. On March 30, 1987, she was suspended for 3 days for working on charts in the patients' lounge. Her defense to this offense is that she didn't think this was prohibited but she did acknowledge that she had been told not to do so much work in the patients' lounge and to stay closer to the nurses' station where she could observe

call lights going on which would indicate a resident in need of a nurse.

Suffice it to say the next infraction by Hatfield could result in her discharge since discharge is the next penalty when an employee had, as Hatfield did, oral warnings, written warnings, and has been suspended.

Hatfield was fired because a patient with the initials AD, who was wearing a vest restraint to prevent her from falling out of bed, was observed to have her vest restraint untied on one side. It was the responsibility of the LPN to check on patients with vest restraints to make sure they were properly secured. Hatfield did not believe the patient had a vest restraint order in her file and indeed the patient did not. However, her chart reflected that the afternoon crew had put her in a vest restraint. Although Hatfield had approximately 95 patients to watch over she should have caught this according to Respondent. However, a patient, according to even Respondent's own witness, DON Gumbo sometimes can untie his or her restraint. The patient did not testify. AD was observed with a loose vest restraint at 12:15 a.m. and again at 6 a.m. Hatfield didn't even know the patient had a restraint. Even if AD untied her own vest restraint Hatfield should have known about it. Hatfield was also fired for only making rounds every 3 hours and not every 2 hours which was Respondent's rule. This rule, i.e., the requirement of making rounds every 2 hours was the subject of in-service training and was reduced to writing and contained in the procedure and policy book at the nurses station. Hatfield admits that she only did rounds every 3 hours and not every 2 hours as required. Doing rounds involves checking in on each resident to make sure they are okay.

Applying the *Wright Line*[1] analysis I conclude that Respondent did not violate the Act when it discharged Brenda Hatfield. I reach this conclusion even though another LPN, Peggy Eisler, failed to make sure that patient MJ had her restraint in place and the patient fell and was injured. Hatfield's disciplinary record was such that her discharge was proper. She also admitted she did not make rounds every 2 hours. Further, Hatfield had an extensive disciplinary record. Eisler was not disciplined in any way but because of differences between the record of Eisler and that of Hatfield I don't find that Hatfield was treated in a disparate and discriminatory manner. Respondent, I conclude, would have discharged Hatfield even if Hatfield had not been prounion. Hatfield's disciplinary record was horrendous.

K. *Unlawful Threats by Respondent Prior to Beginning of Trial*

Kimberly Sylvester, an LPN at Respondent's facility, testified that on September 11, 1988, just 3 weeks before the hearing before me involving this facility, she told Administrator Filippone that she had been subpoenaed and asked if he needed a copy of the subpoena. Filippone replied, ''[Y]ou ought to think long and hard about what you are doing.'' He went on to explain that if Brenda Hatfield got her job back Sylvester's chances of getting a desired transfer would be reduced.

On September 23, 1988, a little more than 1 week before the hearing Filippone approached Sylvester. He said he had heard she was leaving Respondent's employ and wanted to know why. Sylvester told him it was because of unpleasant working conditions and harassment and she thought there may be even more harassment after the upcoming hearings. Filippone replied that it would depend on how Sylvester testified and if she testified in Respondent's favor there would be no harassment.

Filippone's statements to Sylvester shortly before the hearing clearly constitute violations of the Act. Any threat of retaliation for how a person testifies at an NLRB proceeding to which that person has been subpoenaed is a clear cut violation of Section 8(a)(1) of the Act. Sylvester was a very credible witness and I believe her testimony.

III. MOUNT LEBANON MANOR CONVALESCENT CENTER; TRIAL ON OCTOBER 11, 12, AND 13, 1988; CHARGING PARTY IS DISTRICT 1199P

The union organizing campaign by District 1199P began in mid-November 1986, at this facility and ended with an election on January 8, 1987, in which the employees elected not to be represented by the Union. About 1 month before the October 1988 hearings before me involving this facility there was a second election which was won by the Union.

The unfair labor practices are alleged to have occurred during this organizing campaign between November 1986 and January 1987.

A. *The 8(a)(1) Violations by Dietary Manager Michelle Mion*

Amy Habas, who worked at the facility from May 1985 to June 1987, when she quit, credibly testified that on November 22, 1986, the Saturday before Thanksgiving, she signed a union authorization card. She did so in the breakroom at the facility and one of the other employees said that Dietary Manager Michelle Mion was right outside the room. A few minutes later Mion called Habas into her office. She asked Habas if she had signed an authorization card. Habas said that she had. Mion asked Habas who else had signed authorization cards and Habas told her. Mion told Habas that if the Union got into the facility Habas' wages would be reduced because she would have to pay dues.

On December 3, 1986, in a conversation between Mion and Habas in Mion's office, Mion questioned Habas as to why she had stayed so long at work the prior Saturday. Mion told Habas that she knew Habas didn't just have lunch that day but was really at a union meeting.

Mion's statements in November and December constitute unlawful interrogation, threats, and create an impression of surveillance of union activity and are hallmark violations of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

I found Amy Habas to be a credible witness. She was, if it is possible, too timid to lie. I do not credit Michelle Mion's denials that she never said what Habas testified she said.

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board's *Wright Line* analysis met with explicit Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

B. *The 8(a)(1) Violations by Administrator David Thomas and Assistant Director of Nursing (DON) Judy Dyer*

In or about December 1986 Beckie Burgh, who left Respondent's employ after her young son died, credibly testified that at a meeting Administrator David Thomas told employees that if the Union is voted in the pay of employees would be reduced by the amount of union dues and union initiation fee the employees would have to pay but if the union was voted down the the employees would get a 5 percent pay raise in January 1987. In addition, employees would get an additional 2 weeks of vacation. This is a classic unlawful promise to get the employees to vote against a union and is violative of Section 8(a)(1) of the Act. Employee Debbie Townsend credibly corroborates the testimony of Beckie Burgh.

Thomas claims that he didn't promise a 5-percent raise if employees voted against the Union but rather said that there would be a 5-percent pay raise unless union was voted down because if the Union was voted in the pay rates would be a matter of negotiation between employer and union and, as a matter of fact, the employer can't give a raise even if it wanted to do so. The union, I note, was voted down and employees did *not* get a raise. He also denied he promised any extra vacation time. I credit Townsend and Burgh over Thomas.

In November 1986 Elaine Dukes, who later quit Respondent's employ and who is the same Dukes who is the subject of an 8(a)(3) violation discussed below, credibly testified that she attended a meeting of nursing aides at the facility. ADON Judy Dyer and charge nurses Dianne Burger and Marcy Didonati were present. All three are admitted by Respondent to be supervisors and agents within the meaning of the Act. ADON Dyer told employees not to talk about the Union on the floor. This is an overly broad prohibition since it would include prohibiting talk about the Union between employees when they were away from a patient area and on break or during a downtime late at night while not near patients. No other subject of conversation was prohibited except talk about the Union. This is an overly broad, discriminatory, and unlawful rule and its promulgation violates Section 8(a)(1) of the Act.

On a number of occasions during the campaign, November 1986 to January 1987, union organizer Ashley Adams and a number of employees would handbill in front of Respondent's facility. On every occasion Respondent called the police to get the handbillers away from the facility even though access in and out of the facility property was not in any way impeded. Employee Beckie Burgh heard Administrator Thomas tell DON Cecelia Roney to write down the names of those handbilling. In addition, Ashley Adams stayed on the public road while some employees were on Respondent's property. Employees Elaine Dukes and Diane Meade both handbilled and were observed doing so by management. Respondent calling the police because of employee handbilling which does not impede traffic in or out of the facility clearly tends to interfere, restrain, and coerce those employees in the exercise of their Section 7 rights and is, therefore, violative of Section 8(a)(1) of the Act. *Jean Country*, 291 NLRB 11 (1988).

C. *Disciplining of Elaine Dukes and Discharge and Rehire of Elaine Dukes*

Elaine Dukes, who later quit Respondent's employ, was a nurses aide. She was active on behalf of the Union. Her activities included handbilling in front of Respondent's facility. There is no doubt that Respondent at the time it allegedly took unlawful action regarding Dukes was well aware of her prounion sympathies. Indeed, Respondent rated employees between ''1'' and ''5'' based on whether management thought they were very prounion (1) or very antiunion (5). They gave Dukes a ''1'' rating. In addition, Dukes told her supervisor, Diane Burger, with whom she carpooled, that she was prounion.

On December 27, 1986, Dukes was told she was to be disciplined for 4 days' absence. She balked. Dukes told Administrator Thomas and ADON Dyer that she was out sick two of the days and indeed had been sent home by the doctor from the facility and the other 2 days were scheduled days off. Thomas said he would check into it. Shortly thereafter Thomas told Dukes that he owned her an apology that the reprimand would be destroyed and never filed in Dukes personnel file. It is my conclusion that Respondent did not violate the Act by this conduct.

On December 29, 1986, Dukes received an oral warning, reduced to writing, pursuant to Respondent's practice, for failure to properly care for her patients by timely providing nourishment, etc.

Just 2-1/2 months before receiving this warning Dukes had been evaluated as a ''satisfactory'' employee who did ''quality work,'' was ''dependable'' and ''has become a very good employee.''

Dukes credibly denied, in my opinion, that she was in any way a less than caring nurses' aide. It is difficult to believe that between October 17, 1986 (the end of the rating period) and December 29, 1986, Dukes' work performance could have fallen off so dramatically. I am convinced Respondent was out to get her and violated Section 8(al(3) when it disciplined her. This reprimand should be removed from Dukes' file and not held against her if she applies for employment at this facility or any other Beverly facility.

On January 6, 1987, just 2 days before the scheduled election, Dukes was called into the front office by Administrator Thomas and ADON Dyer. They showed Dukes her December 29 writeup and a termination notice dated January 6. They said she was going to be fired. They told Dukes she was being fired because she wasn't doing her job any better than she had been doing it when she got the December 29 writeup. They claimed that two patients, JP and FC, weren't being properly positioned. Positioning of patients is the turning of bed-ridden patients on a regular basis to prevent the formation of bed sores on their bodies. Dukes said the two patients could turn themselves. She was told she was fired.

As she was packing up her belongings Dukes told an LPN why she had been fired. The LPN, Lillian Stanback, told her to wait a minute. Stanback spoke with Thomas and Dyer and evidently supported Dukes' statement that the patients didn't require positioning. Dyer and Thomas called Dukes back into the office. Thomas told Dukes that he apologized again and told her she was not fired. Dyer was in tears and said they had made a mistake. Dukes theorize that since she and her immediate supervisor, Jo Patterson, did not get along that Patterson had told Thomas and Dyer untruths in an attempt

to get Dukes fired. I don't believe that the Act was violated by Respondent first firing and then rescinding that discharge when they found out they made a mistake. I believe that Thomas and Dyer had mistakenly relied on LPN Patterson and when shown by another LPN that Patterson was wrong and Dukes right they apologized to Dukes and let her keep her job. Patterson did not testify. There is no evidence that Patterson's hostile feelings toward Dukes were the product of Dukes' prounion activity.

D. *Change of Work Rules in December 1986*

About 1 month before the scheduled election but after the election campaign had begun Respondent implemented new work rules that can only be interpreted to have been implemented either to interfere with the union organizing effort among the employees or to threaten the employees that if they want a union then conditions around the facility could get rough.

The changes were as follows:

(1) It was posted that employees were not allowed on the grounds more than 15 minutes before they began work.

(2) Employees had to be on the floor 5 minutes before the start of their shift.

(3) Instead of needing a doctor's excuse for an absence or 3 or more days employees would need a doctor's excuse for an absence of 2 or more days.

(4) No personal calls (in or out) from the phone at the nurses' station would be allowed unless the employee had permission from a supervisor or it was an emergency.

Employee Diane Mead testified that in December she was told not to be in the home unless working because of the union activity at the facility.

Prior to these changes in December 1986 employees were allowed on the premises more than 15 minutes before their shift started, didn't have to be on the floor until the shift actually started, needed a doctor's excuse only if an absence was for 3 days or more, and were permitted to make and receive phone calls using the phone at the nurses' station. Tracy Thomas credibly testified that right after the union organizing campaign began in November 1986 Respondent cracked down and would not permit personal use of the phone as it had in the past. These changes were enacted to cause the employees to vote against the Union and their enactment was violative of Section 8(a)(1) of the Act.

E. *Alleged Discriminatory Treatment of Employee Diane L. Mead*

Diane Mead, who was still an employee of Respondent but out on workman's compensation at the time of the hearing, testified that she was hired as a nurses' aide in July 1985. In August or September 1986, before the union organizing campaign began, she was transferred into the medical records office, where she had access to the addresses and phone numbers of employees.

Mead was active on behalf of the Union. She handbilled in front of the facility. Respondent, in rating employees as to whether they were very prounion (1) or very antiunion (5), had given Mead a ''1'' as very prounion.

On or about November 21, 1986, in the midst of the union organizing campaign, Administrator Thomas ordered that Mead be transferred out of the back office. Thomas did so because the unlisted phone numbers of employees were becoming known to union organizers, the employees were complaining about it, and he suspected Mead might be leaking that information to the union organizers. She denied that she did so. This information was available from other sources, e.g., other employees, information kept at nurses' stations, and also Respondent learned in mid-December 1986 that a former administrator at the facility had given the names and telephone numbers of employees to union organizer Ashley Adams. Interestingly enough I believe that Thomas honestly thought she may have leaked information at the time he transferred Mead and I think in this case he acted in good faith. Mead suffered no loss of income since her hours were not changed. I conclude that the transfer of Mead under these circumstances was not a violation of the Act.

In August 1986, before the union organizing campaign began, Mead received tuition reimbursement for her nursing studies at Dusquene University on the orders of Respondent's then regional manager and sometime acting administrator at the facility, Harry Slacum. Mead received $750 for nursing courses for the fall semester of 1986.

During the union organizing campaign, mid-November 1986 to January 1987, Mead was prounion, e.g., she handbilled in front of the facility and was observed doing so.

On January 9, 1987, the day after the election which the Union lost, Mead applied for tuition reimbursement for the spring semester of 1987. On February 6, 1987, she was told she would not receive any tuition reimbursement.

Although technically only full-time personnel were eligible for tuition reimbursement Slacum knew that Mead was a part-time employee, although full time in the summer, when he authorized her to receive tuition reimbursement in August 1986. Mead told Administrator Thomas that Slacum authorized tuition reimbursement even though she was a part-time employee. Thomas later told Mead he checked with Slacum and Slacum had authorized tuition reimbursement for her, according to Thomas, on a one-time-only basis. Mead tried to get in touch with Slacum without success. The phone number she called was either busy or no answer. Slacum did not testify.

It seems clear to me, at least by a preponderance of the evidence, that the benefit of tuition assistance was withdrawn because of Mead's activity on behalf of the Union. She should be made whole by the payment of money to her that she would have received. The complication of her workmen's compensation status and her employment status can be addressed at the compliance stage of this litigation.

IV. CARPENTER CARE CENTER I; TRIAL ON NOVEMBER 7, 8, 9, AND 10, 1988; CHARGING PARTY IS DISTRICT 1199P

This is the first of two cases involving this facility. District 1199P began its organizing campaign at Carpenter Care Center in February 1987. It sought to represent two different units, i.e., a unit of service and maintenance employees (nurses aides, dietary aides, etc.) and a unit of LPNs. Elections were held on April 30 and December 2, 1987, for the service and maintenance employees' unit and the LPN unit, respectively. The Union was later certified by the Board as the collective-bargaining representative for both bargaining units. The election in the LPN unit was delayed by a hearing in April, May, and June 1987 which concerned the issue of whether LPNs were employees or supervisors under the Act

and, therefore, either eligible or not eligible to be in a bargaining unit.

It is alleged that Respondent violated the Act during the organizing campaign with various 8(a)(1) violations and after the campaign by disciplining LPNs Marie Meador, Erika Evans, Lynn Smith, and Pamela Newell because they supported the Union. It is further alleged that Respondent bypassed the Union and dealt directly with employees.

A. *The 8(a)(1) Conduct During Union Organizing Campaign*

On February 23, 1987, LPN Lynn Smith was called into a meeting. At this meeting Mary McKune, the director of nursing (DON) at Carpenter Care Center, advised the LPNs and nurses present that another union organizing campaign was beginning and asked the employees what they knew about it. Smith said she was in favor of the Union. McRune expressed shock at this and asked Smith why she was in favor of the Union. This was clearly unlawful interrogation in violation of Section 8(a)(1) of the Act. *Rossmore House*, supra. Respondent, at this time, was taking the position that LPNs were supervisors and could not be represented by the Union. They were wrong on this point. As noted above the LPNs were found to be employees and not statutory supervisors by the Board and they selected the union to represent them. McKune does not contradict Smith but merely noted in her testimony that she thought the LPNs were supervisors and her interrogation therefore legal. Administrator Andrew Durako and Assistant Director of Nursing (ADON) Jean Franco were present at this meeting.

In early March 1987 another meeting was held in the DON's office. Present were DON McKune, ADON Jean Franko, and Administrator Andrew Durako. Alice Fike, an LPN, who resigned from Respondent's employ in mid-April 1987, credibly testified that Durako asked the people in attendance, which included, among others, LPN Marie Meador, what they knew about the union and if they had been approached by the union. He went on to ask them what the Union could do for the employees. DON McKune also asked what kind of problems existed such that an employee might want a union. Durako claimed that Respondent could handle any problems the employees had regarding such matters as understaffing and lack of supplies and that a union was not needed.

Respondent, by Durako and McKune, clearly violated Section 8(a)(1) of the Act with this unlawful interrogation of employees. In addition, Durako unlawfully promised to correct any complaints or grievances the employees had in order to keep the union out. This also is a violation of Section 8(a)(1). Respondent knew at the time that the Union was seeking to represent the LPNs. Durako testified that he doesn't remember what he said at this meeting. McKune says merely that Respondent considered the LPNs supervisors and not eligible to join a union and they could therefore be questioned as they were about the union activities of other employees, etc. She was wrong.

Then laundry aide Pamela Miller, who voluntarily left Respondent's employ in September 1988, testified that back in mid-March 1987 her supervisor, Shirley Ribler, asked her if she had discussed her asthma problems with the union. Miller had an asthma problem and had been hospitalized for it in February 1987. Kibler went on to say that there are spies and maybe that is why Miller was being given a hard time. Miller had indeed been to a recent union meeting. Kibler, in her statement to Miller, created the impression that the union activities of employees were under surveillance. This is a clear cut violation of Section 8(a)(1) of the Act. Kibler did not testify.

On March 3, 1987, nurses aide Susan McLaughlin came to the facility with her two young daughters to pick up her paycheck. She was upset because she had just found out that her ex-husband, the father of her little girls, was sick. It was around 2 p.m.

Administrator Durako was called by an employee in payroll when McLaughlin asked her for her check. Durako came to the office and asked McLaughlin if she knew the policy a the home. He went on to tell her that checks could not be picked up until 3 p.m. She told Durako that she had picked her check up before 3 p.m. in the past as had others. Durako said he was sick of employees getting special favors and that they thought they'd get everything they wanted if the union got in but it wouldn't be any better. When Durako was told by McLaughlin that her daughters' father was ill he became apologetic, let her pick up her check, and asked her not to tell anyone about what had happened. The taking away of a benefit—early pick up of checks—because of a union organizing campaign is a violation of Section 8(a)(1). The message is clear, i.e., if you vote for the union working conditions won't be as nice.

On October 9, 1987, Respondent granted a wage increase of 60 cents per hour to all LPNs. Respondent claims it did so because a number of LPNs had quit and they needed to give a pay raise to keep the LPNs they had on board. This wage increase was given on the eve of the election in the LPN unit which was held on December 2, 1987. Based on the timing of the wage increase in relation to the election and considering Respondent's antiunion position it is clear to me that the granting of this wage increase violated Section 8(a)(1) of the Act since it was intended to effect the outcome of the election toward Respondent's position, i.e., a vote *against* the union.

B. *Suspension of Marie Meador*

Marie Meador was suspended for 3 days on July 7, 1987, for allegedly mistreating a nurses aide.

At the time she was suspended Meador was veteran of 10 years service at this facility as an LPN. She was active on behalf of the union and was well known by Respondent to be prounion. She wore a union button at work. In addition, she sat at the union counsel table and testified at the hearings in April, May, and June 1987 wherein the status of the LPNs as supervisors or employees was litigated.

Suffice it to say on June 4, 1987, LPN Marie Meador got into an argument with nurses aide Melinda Rogers. Slightly more than month later Meador was disciplined. Meador thought that Rogers, who testified as a witness for Respondent at the LPN hearings, had lied about an incident involving Meador. Meador was an LPN on the 3 to 11 p.m. shift and approached Rogers. She asked Rogers if her conscience was bothering her. Rogers replied in the negative. Meador went on to say she was going to sue Rogers and take her to court because she lied at the hearing. Meador went on to say that Rogers worked for her and if she didn't like it she could call in sick. Rogers asked Meador if Meador was threatening her

and Meador said to her that she could take it anyway she wanted. This exchange between Meador, who appears to be in her fifties, and Rogers, who is in her twenties, was observed by nurses aide Audrey Russell and some others. Russell told Meador not to talk to Rogers like that. With respect to what Meador, an LPN, said to Rogers, an aide, I credit Rogers and Russell. Meador and Rogers agree that they were both speaking loudly. Russell, who I don't credit on this one point, claims that only Meador raised her voice. Meador was prounion. Rogers and Russell were antiunion.

Meador is not a statutory supervisor but was over aide Melinda Rogers. Clearly Meador should *not* have criticized Rogers, someone under her, because of that underling's testimony at the hearing and should not have threatened her with a lawsuit. But the question remains whether Respondent suspended Meador for 3 days without pay—the most severe form of discipline short of discharge— because of Meador's prounion activity or some other reason. I believe Respondent suspended her rather than giving her an oral reprimand because of Meador's prounion activity. In the suspension write-up Respondent refers to Meador as a ''supervisor'' although that was the very issue in the hearing. Meador was a 10-year veteran with an outstanding record. Respondent conceded that she was an excellent LPN. Meador is an emotional person and quick to cry. Her reaction to Rogers was wrong but Rogers yelled back and she was not disciplined in any way. In view of Respondent's antiunion posture, Meador's significant involvement with the union, the fact that this is the only blemish on this 10-year veteran's record, the absence of any discipline of any LPN for similar misconduct, I must conclude applying the *Wright Line*, supra, analysis that this very severe penalty of suspension for 3 days without pay was meted out because of Meador's protected concerted activity and Meador would not have been disciplined but for her prounion activity. This is a violation of Section 8(a)(3) of the Act.

C. *Discharge of Erika Evans*

On August 19, 1987, LPN Erika Evans was indefinitely suspended pending investigation and on August 24, 1987, was fired because of an incident on August 16, 1987, which Respondent in the termination notice described as ''gross misconduct and insubordinate behavior'' but which was referred to during the hearing as the ''mooning'' incident.

Evans was a nurses aide. She had worked at the home since 1978 and prior to her suspension and discharge for the incident in August 1987 had not been disciplined since 1978. An unblemished record for 9 years.

Evans was active on behalf of the Union. She handbilled in front of the home. She spoke in favor of the Union at employee meetings which management called. She wore a union pin. She testified for the Union during the LPN hearings which were held in April, May, and June 1987.

Evans' last rating period ended in June 1986. In each of eight categories she was rated either ''outstanding'' (highest rating possible) or ''very good'' (the second highest rating). In short, her work record was outstanding.

On August 16, 1987, a Sunday, Evans and several other nurses' aides engaged in behavior that would be considered to be silly or juvenile but potentially serious, i.e., the aides were putting on call lights and were loudly laughing about it. They were told by a supervisor to be quiet. Evans is a young woman in her twenties and was noticeably pregnant at the time. Evans was not disciplined for this horseplay but rather she was disciplined because she said that whoever complained could ''kiss my ass'' and she actually pulled down her maternity pants several inches in the presence of Mary Hebna, a woman who appeared to be 20 years Evans' senior, and who was the senior management official on duty at the facility at the time. Hebna was social services director and a former nurses aide herself. Evans, after pulling her pants down, immediately pulled them back up.

Both Evans and LPN Lynn Smith admit that Evans said ''kiss my ass'' or ''kiss my butt.'' Both claim that Hebna then said ''bare it baby'' before Evans actually pulled down her pants 4 or 5 inches and bared part of one cheek of her bare buttocks. Hebna claims she did not say ''bare it baby'' but said ''in your condition [Evans was pregnant] you don't want to bare your bottom.''

No residents in the home observed this incident. The only witnesses were female employees of the facility. I conclude that Hebna did say to Evans ''you don't want to bare your bottom'' but that Evans and Smith honestly believed she said ''bare it.'' The ''mooning'' was partial and over in an instant. It was clearly inappropriate behavior, but was Evans discharged for that reason or because of her prounion activities. I note that Hebna is an ex-nurses aide and Smith and Evans were nurses aides. These are people on the front lines of elderly resident care. These are people who clean up after residents who have been sick and thrown up or who have soiled themselves because they are incontinent. They are tougher, I suspect, and less squeemish, I'm sure, than your average person. And thank God, there are people willing to do that kind of work for a living. Hebna simply could not have been that appalled by Evans' conduct.

Based on Respondent's antiunion posture, Evans' prounion activity, the relatively insignificant nature of this incident (the witnesses to it laughed with the *possible* exception of Hebna) applying the *Wright Line*, supra, analysis I must conclude that Respondent's harsh discipline of Evans was motivated by her prounion activity and that Respondent violated Section 8(a)(3) of the Act in discharging Evans. Not surprisingly ''mooning'' is apparently rare even in the nursing home business. This was the only discipline in this litigation involving ''mooning.''

D. *Written Warning to Lynn Smith*

On August 27, 1987, Lynn Smith received a written warning for two incidents which occurred on August 16, 1987. In the first incident LPN Lynn Smith along with nurses aides Carol Shotwell and Sue McLaughlin lifted laundry aide Josephine Clete into a food cart and spun the cart about. All four employees LPN Smith, nurses aides Shotwell and McLaughlin, and laundry aide Clete received written warnings. Since all four were similarly disciplined I cannot and do not find that Smith's written warning for the food cart incident was unlawful.

The second incident for which Smith received the written warning was because she observed Erika Evans ''moon'' Mary Hebna and (a) did nothing about it, and (b) laughed and this part of the written warning, I believe, was unlawfully given to Smith. How can Smith's failure to discipline Evans be improper since what Evans did she did in the presence of Smith and Smith's senior, i.e., Mary Hebna. Hebna

did indeed take action against Evans (see sec. 4,c, above). Arguably if Hebna had not been a witness to the incident Smith possibly should have brought it to her attention but Hebna herself was an eyewitness to the ''mooning.'' Laughing at a ''mooning'' incident is rather involuntary in nature and not like laughing at a funeral. It is inconceivable that someone would be disciplined for this absent some other reason.

Smith was active on behalf of the Union, e.g., she was with union organizer John August on March 10, 1987, when he went to the facility and demanded recognition of the Union, she handbilled, although she didn't testify at the LPN hearings she did sit at counsel table with the Union, she wore a union pin, she petitioned management to give the Union equal access to the facility bulletin board. I believe her union activity played a key role in that part of the written warning that charges her with unprofessional conduct regarding the ''mooning'' matter and that portion of the warning should be excised. The only practical way would be to rewrite the warning alleging only the food cart incident. Since aides are lower in the chain of command at this nursing home than LPNs and since the aides involved in the food cart incident received written warnings I don't believe the law requires that Smith's written warning be reduced to an oral warning or fully set aide.

E. *Written Warning to Pamela Newell*

On August 22, 1988, Pamela Newell, who was the night cook in the dietary department and who worked at the facility from August 1983 to October 1988, was issued a written warning for leaving her work area without permission.

Newell voted in the union election held among the service and maintenance employees and her vote was challenged by management. During the course of that challenge Newell told her supervisor, Dietary Services Manager Marion Holehan, shortly after the April 1987 election that she voted in favor of the Union. Newell was also a union delegate and on the negotiating team. Therefore, management knew she was prounion.

The delegates, to include Newell, agreed around 11 a.m. on August 18, 1988, that they would meet with DON Mary McKune in McKune's office at 1 p.m. that day. At 1 p.m. Newell looked for her supervisor, Marion Holehan, and her assistant, Florence Brady, to tell them she was going to a union meeting in the DON's office but she couldn't find either women. She waited a while and finally went to McKune's office at 1:45 p.m. She got to the meeting just as it was ending. She then returned to work. She was at the meeting approximately 10 minutes.

Newell received a written warning for leaving her work area without permission. I note that Newell was permitted two 15-minute breaks during her workday. Her workday on August 18 was noon to 8 p.m. She usually took one break before and after her scheduled lunchbreak at 4 p.m. She was required to clock out for her 15-minute breaks.

It seems clear to me that Newell took her break earlier that day and attended the tail end of the union meeting which took her away from her work station for the same amount of time as her break would have taken her away from her work station. There is no evidence that Newell's absence from the kitchen in any way interfered with the preparation and serving of meals to the residents. I am forced to conclude that she was disciplined because of her union activity. This is a violation of Section 8(a)(3) of the Act.

Some 2 months prior to this incident Newell received an oral warning, which was in writing pursuant to Respondent's practice, from the same person who gave her the written warning in August 1988, i.e., Marion Holehan. This oral warning is not alleged as violative of the Act but is instructive in so far as it shows what lengths Respondent was willing to go to punish this active union supporter. In late May 1988 Newell told Holehan that she might have to take leave if her uncle in New Jersey, who was near death, died. Holehan said she'd have to check the schedule and see if Respondent could accommodate Newell. Newell allegedly said ''Fuck the job. If he dies, I'm going.'' Newell claimed she didn't say ''fuck the job'' but if in her anguish she did say that it is incredibly cruel and heartless but nonetheless true that she was written up for using foul language. This type of discipline could only be attributed to Holehan being hellbent to *get* Newell. Holehan did not testify.

F. *Unilateral Changes*

On August 11, 1988, which was after the Union was certified by the Board as collective-bargaining representative for the service and maintenance unit which included nurses aides and Respondent and the Union were in negotiations for a contract Respondent, without prior notice to the Union and without affording the Union an opportunity to bargain, unilaterally implemented a new policy which gave a $50 bonus to nurses aides who worked an additional two shifts beyond their normal shifts in a pay period. This is a clear cut violation of Section 8(a)(5) of the Act. Wages are a mandatory subject of bargaining and before making any unilateral changes in this area an employer must give notice and opportunity to bargain about it to the representative of the employees.

G. *Bypassing the Union and Dealing Directly with the Employees*

Negotiations between Respondent and the Union began in May 1988 with respect to both the service and maintenance unit and the LPN unit. After the parties had agreed on all noneconomic issues there was a hiatus in negotiations. During this hiatus—in August 1988—groups of employees (mostly union delegates) met with Andrew Durako, the administrator, to complain about short staffing. Durako told employees to check with the Union to see about getting back to the negotiating table to discuss economic issues. If there were better wages, the argument went, it would be easier to keep employees and to recruit new employees. Hence, the short staffing problem could be resolved.

Since the employees met with Durako on their own motion and not his and since Durako merely told the employees to contact their union I don't find that this conduct rises to the level of the unfair labor practice of management bypassing the Union and dealing directly with the employees on terms and conditions of employment.

V. MAGNOLIA MANOR, MAGNOLIA, ARKANSAS; TRIAL ON SEPTEMBER 18, 1989; CHARGING PARTY IS UFCW LOCAL 1583

The Union was the certified representative of the employees at Magnolia Manor. A collective-bargaining agreement was in effect which ran from September 18, 1986, to September 17, 1987. The contract called for full-time employees to receive 5 days' vacation with pay after 1 year of employment and 10 days' vacation with pay after 3 years of employment.

It is alleged that in the middle of June 1987 that Annie Cornelius, the dietary services manager, circulated a petition among unit employees to decertify the Union and promised employees that if the Union was decertified that they would receive improved vacation benefits. Respondent admits that Cornelius was a supervisor and agent of Respondent within the meaning of the Act.

I credit the testimony of Dorothy Gay, the administrator, that she did not authorize or even know of Cornelius' efforts to decertify the Union. Gay impressed me as a credible witness.

Annie Cornelius, on the other hand, did not impress me as credible at all. She was contradicted by four witnesses, i.e., Dorothy Lewis, Leslie Ann Williams, Tennessee McDaniels, and Charlotte Ford, all of who I found credible and all of whom were bargaining unit employees.

Dorothy Lewis, who is no longer with Respondent, testified that Annie Cornelius approached her as she was about to run a whirlpool bath and asked her to sign a petition to get the Union out and if successful Lewis would get 3 weeks' vacation and better benefits. Lewis signed the petition. Later that day she saw Tennessee McDaniels who asked Lewis if she had signed the petition. Lewis said yes. Ruby Manning also asked Lewis if she signed the petition and Lewis again said yes. Lewis, McDaniels, and Manning were all nursing aides. Lewis thought better of her decision to sign, sought out Cornelius and crossed her signature off the petition. That portion of the petition where Lewis' name is crossed out was introduced into evidence and corroborates Lewis' testimony.

I also credit the testimony, as noted above, of nurses aide Leslie Ann Williams and housekeeper Charlotte Ford. These ladies testified that Cornelius called them into a patient's room and asked them to sign a petition to get the Union out and if the Union was out, Cornelius went on the tell them, they would get 3 weeks' vacation like the employees do at Hamburg. Respondent owned a facility in Hamburg, Arkansas. Williams and Ford refused to sign the petition. Williams was not a member of the Union but was in the unit. Williams is still an employee at the facility. Ford is no longer at the facility. Ford had dropped her union membership nearly 6 months before this incident with Cornelius. Needless to say neither Williams nor Ford could be classified as such faithful union supporters that they might lie for the Union.

I credit the testimony of Tennessee McDaniels, who is no longer with the facility, that during the summer of 1987 Cornelius approached her in the dining room hall and asked her to sign the petition to get the Union out and she would get 3 weeks' vacation like the employees do at Hamburg and better benefits. She didn't sign the petition.

Cornelius was simply not credible. She claimed employee Ira Wyrick asked her to give some papers to Lewis and she did so. Period. She claimed she never asked Lewis, Ford, Williams, or McDaniels to sign anything. I don't believe her.

As noted above Respondent did own a facility in Hamburg, Arkansas, named Leisure Lodge, where the employees were represented by the same union which represented the employees at Magnolia Manor, i.e., UFCW 1538. Those employees as it turned out had the same vacation benefits as the employees at Magnolia Manor.

Since I credit the testimony of Lewis, Williams, Ford, and McDaniels it is obvious that Respondent violated Section 8(a)(1) and (5) of the Act by promising improved vacation benefits if employees signed a petition to decertify the Union. *Maxi City Deli*, 282 NLRB 742, 745 (1987).

VI. COLONIAL PARK NURSING HOME, MARSHALL, TEXAS; TRIAL ON SEPTEMBER 11, 12, AND 15, 1989; CHARGING PARTY IS SEIU 606

On April 14, 1987 nurses aide Joyce Garmon was fired. In the termination notice it read that Garmon ''insulted and used abusive language to Administrator. Neglected residents by not changing and drying them as per policy and as per request of Administrator.'' The written termination notice was prepared a day after the discharge.

Joyce Garmon, a middle-aged black woman who is 5 feet 8 inches tall and weighed 190 pounds at the time she was fired, was actively prounion. She joined the Union during the organizing campaign. She handbilled. She and 33 other employees signed a document which was posted inside the facility before the election urging their fellow employees to vote for the Union. The Union won the October 10, 1986 election and was certified by the Board. Garmon and nine other employees were on the negotiating team for the Union. Garmon attended approximately four negotiating sessions between November 1986 and her discharge on April 14, 1987. She missed only two sessions. She missed the session on March 17, 1987, because her husband had died 3 days earlier. The last session she attended was on March 31, 1987, about 2 weeks before she was fired. At this session she and Steve Rinolo, the chief spokesman for Respondent, got into an argument. They were talking about a wage increase and Rinolo pointed out that wages in parts of Texas other than Marshall, where the facility is located, pay more and if the employees wanted to make the money they were requesting ($3.55 per hour) they should move. Suffice it to say tempers flared a bit and Garmon was angered that the employees were being told to move and Dionicia Rivera, the administrator of this facility and the man who fired Garnon, saw this heated exchange between Garmon, an employee under him, and Rinolo, a person some steps above Rivera in the corporate chain of command. Garmon had never been disciplined before April 14, 1987. Her ratings were ''satisfactory.''

At approximately 5 a.m. on April 14, 1987, Rivera, a short, slight man, 5 feet 5 inches and 136 pounds, of Phillipine extraction who speaks English with an accent and had been in the Unites States for only 6 years, came into the facility to make rounds. A short time prior to this day a state survey of the facility had revealed some deficiencies, to include patients with bed sores. Bed sores can be the result of patients being left wet. Part of the facility's plan of correction to remedy the deficiencies revealed in the state survey was to put greater emphasis on keeping patients dry.

Rivera made rounds on the wing where Garmon worked with licensed vocational nurse (LVN) Mary Jo Haggerty. In Texas LPNs are apparently called LVNs. Rivera saw a patient in one room who was wet. He put on the call light and went to the next room and saw another patient who was wet and put that call light on as well. When he exited the second room he saw that Garmon, the nurses aide responsible for responding to the call lights, had turned off the first light. He went into a third room and found yet another patient wet. Rivera asked Garmon if she was going to dry the patient. Garmon said she would dry the patient. Rivera got angry and said ''don't turn off the call light until after you dry the patient.'' Rivera claims Garmon first raised her voice. Garmon said Rivera raised his voice first and then she raised her voice. LVN Haggerty was present at this exchange between Rivera and Garmon. Also present was nurses aide Ann Boyd, who is no longer in Respondent's employ. Rivera again asked Garmon if she was going to dry the patient. She said, ''I'll dry the patient.'' Rivera asked, ''Are you challenging my authority?'' Garmon replied ''no.'' Rivera fired Garmon on the spot.

Rivera claims that before he fired her Garmon threatened him by saying ''I'm going to whip your ass.'' Garmon credibly denies that she said that to Rivera. Haggerty, who is still in Respondent's employ, and has many attributes of a supervisor, i.e., authority to approve employees not coming into work or leaving work if sick and the authority to give oral and written warnings to other employees, was the closest person to the exchange between Garmon and Rivera. Haggerty testified credibly that Garmon did not say to Rivera, ''I'm going to whip your ass'' or words to that effect. Haggerty concedes that Garmon was insubordinate to Rivera when she sarcastically told Rivera she would clean the patients. Ann Boyd, who no longer works at the facility, testified credibly that she also overheard the exchange between Rivera and Garmon and Garmon did not say to Rivera that she was going to ''whip his ass'' or words to that effect. Boyd, I note, was a nurses aide, and was opposed to the Union.

I conclude as a matter of fact that Garmon did not threaten Rivera or say ''I'm going to whip your ass'' or words to that effect. The only evidence she did is Rivera's testimony, and I find Garmon, Raggerty, and Boyd more credible. Respondent put into evidence a statement from LVN Lucille Shaw, which came from Respondent's files. Shaw, in this statement, claims that she heard Garmon say to Rivera ''I might as well whip your so and so you're going to fire me any way.'' Shaw did not testify.

Although insubordination in Respondent's handbook is an offense for which an employee can be fired for a first offense as distinguished from first being orally warned and then receiving a written warning I note that evidence at the hearing reflects that between January 1, 1986, and December 31, 1987, four employees received oral warnings for insubordination, seven received written warnings for insubordination, and only two employees, Carney Pierce and Laverne Russell, were discharged for insubordination. Both Pierce and Russell, contrary to Garmon, had long histories of insubordinate conduct.

Orell Fitzsimmons, business agent for the Union, testified that he spoke with Rivera subsequent to Garmon's discharge. According to Fitzsimmons Rivera told him that in firing Garmon he was only following orders and when Fitzsimmons asked Rivera if Roger Brown, Respondent's regional human resources representative, who was present at the March 31, 1987 negotiating session when Garmon and Rinolo argued, had ordered that Garmon be fired Rivera, according to Fitzsimmons, refused to answer the question. Rivera denies he said he fired Garmon on orders from above. Rivera testified he fired Garmon because of her insubordinate attitude.

Since I conclude that Garmon did not threaten Rivera I must and do, in light of the other evidence, conclude that Garmon was discharged because of her participation in union activity to include her heated exchange with Rinolo just 2 weeks before her discharge. Hence, Section 8(a)(3) of the Act was violated. Garmon, who had ''satisfactory'' ratings and no prior discipline, was discharged for insubordination at a facility where only 2 employees out of 13 disciplined for insubordination had been discharged while the other 11 received lesser discipline and the 2 employees who were discharged had long records of insubordination.

Haggerty was of the opinion that Garmon was insubordinate but did not threaten Rivera. Boyd testified that when Rivera told Garmon that patients were wet she said it wasn't time for hall check, which would be at 6 a.m. and this was only 5:45 a.m. Garmon said she would clean and dry the patients and was in the process of doing so. If Garmon was insubordinate and if Rivera had orally or even in writing reprimanded her for that it would be one thing but to fire this prounion supporter was massive overkill. Garmon was discharged because of her protected concerted activity in violation of Section 8(a)(3) of the Act. I reach this conclusion applying the *Wright Line*, supra, analysis. In light of all the facts I conclude that either no discipline or much more minor discipline would have been meted out to Garmon absent her concerted activity, which included speaking her mind at the negotiating session 2 weeks before her discharge.

VII. CLAYSTONE MANOR, ENNIS, TEXAS; TRIAL ON SEPTEMBER 13, 14, AND 15, 1989; CHARGING PARTY IS SEIU 606

The Union mounted a union organizing campaign at Claystone Manor in the fall of 1986. An election was held on December 19, 1986. The Union lost the election.

It is alleged that Respondent violated the Act when DON Jajuana Brunk on November 11 and 12, 1986, threatened nurses aide Denise Kirven with discipline and discharge because of her activities on behalf of the Union, when Denise Kirven was issued a written warning on November 12, 1986, and when Denise Kirven was discharged on March 19, 1987. It is alleged that all these things were done because of Kirven's union activities.

During the campaign Kirven was openly prounion and the management at the facility was well aware of it, e.g., pieces of union campaign literature, some with Kirven's picture and name on it and some with just her name on it, had come to the attention of Administrator Dorothy Mahoney and other supervisors at the facility.

Kirven began her employment at the facility in August 1985. On November 11, 1986, a union flyer was passed out which had separate photographs of four employees, one of whom was Denise Kirven. The flyer said ''we're organizing a union because'' and next to Kirven's picture it said ''of

unfair disciplining.'' The flyer went on to say right next to Kirven's picture that ''when an employee gets written up, she doesn't know anything about it.''

DON Brunk, with this flyer in hand, came into the break area at the facility and ordered Kirven into her office. Brunk told Kirven that she (Brunk) had never written up Kirven unfairly. The next day, November 12, 1986, Brunk called Kirven back into her office and told Kirven that she (Kirven) was bad-mouthing Beverly and that she (Kirven) should shut her mouth or Brunk would throw the book at her for insubordination. All that day Brunk watched Kirven closely.

In February 1987—2 months later and after the election—Kirven saw her file and saw that she had received an oral warning, which was reduced to writing, for unprofessional conduct, insubordination and poor attitude toward supervisors and fellow employees.

It is clear to me that Kirven was threatened and disciplined (an oral warning placed in her file) because of her activities on behalf of the Union. Kirven saw her file in February 1987 when she inspected it in connection with a written warning she received at that time, i.e., February 1987. This written warning for failing to attend to the needs of a patient is not alleged to have been given unlawfully. During this same inspection of her file Kirven did not see a written warning dated January 6, 1987, and signed by LVN Tim Massey for insubordination. With respect to this warning of January 6, 1987, Massey had supposedly told her to double-check her floor. She got angry and claimed her floor was OK. A patient was later found wet. In addition, she did not see a written employee memorandum, which had no box checked indicating whether it was an oral warning, a written warning, a suspension, or discharge. This writeup was also for insubordination and dated January 5, 1987. It was signed by Steve Maxey, activity director at the facility. It was not until March 1987 that Kirven saw these two writeups for the first time.

Kirven called the 800 number where employees could make complaints to Beverly. She left a message on the 800 number that she had received a number of writeups and didn't know anything about them. She asked that Roger Everett, human resources manager, call her on this matter. He never did.

On March 18, 1987, Kirven was fired. Her discharge writeup was signed by then acting DON Beth Howze. It stated that Kirven was discharged for unprofessional conduct, i.e., spreading a malicious rumor among the other nurses aides that Howze was a witch and practicing witchcraft at the facility.

I might note at this point that while I found Kirven to be a credible witness I also found her to be singularly lacking in sophistication and very gullible. She is quite simply not very bright. Her discharge writeup reflected that she had three prior written warnings on file. Kirven testified that Steve Maxey had told the employees after the election that writeups prior to 1987 would be taken out of employees' files in order to put the union campaign behind them. Steve Maxey, at this time assistant administrator, admits he told employees that after the election campaign they would be starting out with a clean slate but denies he said that prior warnings would be pulled from employees' files.

Her three written warnings were January 5 (Massey) and 6 (Maxey) and February 27 (failure to provide proper care to patients), all of which were referred to earlier and all of which are dated 1987. The only legitimate one was the written warning on February 27, 1987, given Kirven by LVN Mary Taylor for neglect of a patient. The neglect was failure to clean up the patient and change her linen. Kirven's explanation was that the patient didn't want to be turned and the other morning care would be done later, but this is no defense and, in any event, it is not alleged that this written warning was given unlawfully.

During the campaign, which ended when the Union lost the December 19, 1986 election, Kirven passed out literature, to include the piece of campaign literature with her name and picture on it dated November 11, 1986, referred to above. A flyer dated November 19, 1986, contained her photographs as well and that of three other employees. A flyer singed by Kirven and 12 other employees demanded that employees be paid overdue raises by November 28, 1986. It cited two employees who had overdue raises due them. One of the two was Denise Kirven.

Prounion flyers, dated December 16 and 18, 1986, bore Kirven's signature and those of nine other employees. All these flyers were posted in the breakroom in the facility, where management officials could easily see them and they were handed out in front of the facility.

While Kirven may not have been the world's greatest nursing aide (she was counseled a number of times about her work performance prior to the beginning of the union organizing campaign), she did receive a performance evaluation for the period beginning August 5, 1985 (when she was hired), and which performance evaluation is dated October 31, 1986. She received an overall ''satisfactory'' rating but as rated very good'' in the areas of ''relationship with the others,'' ''dependability,'' and ''initiative.'' The election petition was filed in November 1986 shortly after this evaluation.

With respect to the reason for her discharge Kirven admits that she did discuss with some nurses aides the fact that acting DON Howze read the palms of some aides and Kirven wanted to know how she could tell the future by doing so. In point of fact Howze admits that around Halloween—some 4 months earlier—she had read some pals and foretold the future as a Halloween-type of trick. Howze claims she heard Kirven talking with some nurses aides in the rest room. Howze heard Kirven say that Howze was a witch and practicing witchcraft. None of the nurses aides who Kirven had spoken with were called as witnesses by either side.

The closeness in time between the distribution of the flyer wherein Kirven's picture appeared next to a section of the flyer complaining about unfair discipline leads me to believe that Kirven was threatened on November 11, 1986, and given the oral warning by DON Brunk because of Kirven's union activity, specifically her appearance on the flyer and the substance of the flyer. In addition, I credit that portion of Steve Maxey's testimony wherein Maxey said he asked Brunk why Brunk was so mad at Kirven and Brunk said it was because of the flyer.

In deciding whether or not Kirven was discharged because of her prounion activity, I note the following truism: employees will gossip among themselves about their bosses. That is a simple fact of the workplace. Howze had acted like a fortune teller, had read palms and predicted the future and Kirven, who I noted above impressed as being not very bright, was asking her fellow aides not residents or patients

in the facility or their families and not in a place where residents or their families could overhear her—how could Howze tell the future by reading palms. It is inconceivable to me that Kirven was discharged for engaging in this conversation. There must be another reason for the discharge and that reason, I believe, was Kirven's prounion activity, which was well known to the management of the facility.

Maxey, who left Respondent's employ in April 1987, testified that Human Resources Representative Roger Brown, on two occasions, once in November 1986 and once on the day of the December 19, 1986 election, said, referring to employees who appeared on the union flyers, that they and the other troublemakers would be fired and it was Roger Craig's desire that they be fired. Craig was the president of Beverly's then Texas Division. I don't believe Maxey on this matter. Roger Brown credibly denied he ever said this and Administrator Dorothy Mahoney credibly denied that Brown said it as well and she was present on both occasions when he supposedly said it. Maxey was just not credible on this point.

Maxey testified that he wrote up Kirven on January 6, 1987, for insubordination. He testified that he didn't think she was insubordinate but wrote her up because DON Tim Massey told him that he should. He did not check a box on the form indicating whether it was an oral or written warning but testified that if it had been a written warning he would have had to get Kirven to sign it and he did not have her sign it. Indeed he did not even tell her be wrote her up.

Beth Rowze was Acting DON when she fired Kirven. Howze testified that she had had trouble with Kirven prior to discharging her, i.e., Kirven had yelled at Howze and been negligent in shaving male patients and keeping patients dry. Howze said she discharged Kirven because she beard Kirven tell four nursing aides in the bathroom that Howze was a wicked old witch and did witchcraft on patients and other aides. Howze, obviously, denied that she was witch. Howze said she called Administrator Mahoney at home, told her about what Kirven said, and was given approval by Mahoney to discharge Kirven.

Beverly campaigned successfully against the Union. The evidence reflects that Kirven was very active on behalf of the Union and had satisfactory work performance ratings up to the period just before the campaign began. Would Kirven have been fired for discussing a boss with her fellow employees in private absent her union activity? I think not. Kirven is not very bright and Howze, I suspect, was smart enough to realize that. Howze was present during the union organizing campaign and the death penalty of the work place, i.e., discharge, would not have been Kirven's penalty if Kirven had not been prounion for the offense of talking about a boss with her fellow employees. The boss herself, Howze, admits that she read palms of both aides and residents at the facility and she also read tarot cards. It was so silly for Kirven in her naivete to suggest Howze was a witch and could tell the future that no reasonable person could believe she was fired for that reason. There had to be another reason and there was. It was Kirven's prounion activity. Her discharge was a violation of Section 8(a)(3) of the Act.

VIII. BEVERLY HEALTH CARE CENTER, GLASGOW, WEST VIRGINIA. TRIAL ON OCTOBER 16 AND 17, 1989. CHARGING PARTY IS UNITED STEELWORKERS OF AMERICA

In a Board-conducted election on July 22, 1987, a majority of employees in a service and maintenance unit at the Beverly Health Care Center, Glasgow, West Virginia, voted to be represented by the United Steelworkers of America.

Negotiations for a first collective-bargaining agreement began on October 22, 1987, and eventually the parties, with the assistance of a Federal mediator, reached agreement on May 26, 1988, on a contract, which was ratified by the members of the bargaining unit on June 11, 1988. It was effective retroactively from June 1, 1988, for a 2-year period with a wage reopener after 1 year.

It is alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union from December 1987 through May 1988. I disagree and will recommend that the unfair labor practice allegations involving this facility be dismissed.

The parties met on October 22, November 5 and 24, and December 15 and 16, 1987, for several hours on each on of those days. The chief negotiator for the Union was Larry Ratliff, a staff representative and subarea director for the Union. Ratliff remained chief negotiator for the Union throughout the negotiations. He was assisted by a negotiating committee of three unit employees. The chief negotiator for Respondent between October 22 and December 16, 1987, was Rod Panyik from Respondent's then Central Division. Because of a corporate reorganization Panyik was replaced beginning in January 1988 by George Ulrich from Respondent's then Eastern Division. Ulrich remained as Respondent's chief negotiator until agreement was reached.

The Union made its proposal for a contract on October 22 and the parties discussed it. On November 5 Respondent made its proposal for a contract and it was discussed. By November 24 the parties had reached agreement on some issues. On December 15 and 16 the parties reached agreement on even more issues.

On January 5 Ulrich appeared for the first time. He said he would go along with all the clauses that Panyik agreed to although he didn't like some of them.

Eventually, with union approval, the parties agreed to modify the way a tie in seniority could be broken by going back to what the Union had initially proposed to Panyik. The parties on January 5 agreed to meet again on January 26 and 27 as well as February 16 and 17 and did so. After the session on January 5 Ulrich and Ratliff met privately and agreed to meet privately again on January 25 the night before the next scheduled negotiating session. They did so. Ulrich, at this meeting on January 25, informed Ratliff that Beverly, for the first time in its history, had a year in which it lost money, i.e., $33 million in 1987 and that the facility in Glasgow lost $225,000 in 1987.

On January 26 the parties reached agreement on more matters and on January 27 they discussed, among other things, contracting out, military leave, insurance, and weekends off. On February 16 Respondent made an economic proposal which was less than what the employees would get if they

were nonunion. This is not a per se violation of the Act. On February 17 Ulrich told the Union that the employees will get no more than what is in the Employee Handbook for the Eastern Division. Ulrich denies he ever said this but I credit both Larry Ratliff and Dorothy Tucker, a member of the union negotiating team and a bargaining unit employee, that Ulrich said several times during negotiations that the employees would get no more than what is in the handbook, which is what nonorganized employees would get. Ratliff and Tucker impressed me as very honest people. I also credit Tucker that during the union organizing campaign that Mike Plott, who was helping to run Respondent's campaign against the Union, said that if the Union got in the employees would get no more than what they will get under the handbook as nonunion employees.

The management-rights clause proposed by Respondent was discussed on November 24 and December 16. It was very broad and Respondent eventually modified it when the parties met with the Federal mediator. It is alleged that Respondent's insistence on this broad management rights clause by itself amounted to bad-faith bargaining. However, the USWA entered into a collective-bargaining agreement with another Beverly facility, i.e., Pleasant Grove in Alabama, and that agreement contained a management-rights clause identical in all respects to the one proposed by Respondent during these negotiations.

On February 17 the parties agreed to meet again on March 24 and 25, as well as on April 7 and 8 and they did so. On March 24 and 25 the parties discussed a host of subjects and agreed on some, e.g., holidays, sick days, vacation. On April 7 the parties met from 9 a.m. to 5:30 p.m. and reached agreement on pension rights and dues checkoff. On April 8 Respondent modified the management-rights clause. The original proposal of Respondent was as follows:

> 3. *ARTICLE II MANAGEMENT RIGHTS*
>
> The Employer retains the exclusive right to manage the facility, to direct, control and schedule its operations and work force and to make any and all decisions affecting the business. Such prerogatives, rights, powers, authority and functions shall include but are by no means whatsoever limited to the sole and exclusive rights to:
>
> 1. Hire, promote, demote, layoff, assign, transfer, suspend, discharge or discipline employees.
>
> 2. Select and determine the number of its employees assigned to any particular work.
>
> 3. To increase or decrease that number.
>
> 4. Direct and schedule the work force.
>
> 5. Determine the location and type of operation.
>
> 6. Determine and schedule when overtime shall be worked.
>
> 7. Install or remove equipment.
>
> 8. Determine the methods, procedures, materials, and operations to be utilized or to discontinue their performance by employees of the Employer and/or to contract or subcontract the same.
>
> 9. Transfer or relocate any or all of the operations of the business to any location or to discontinue such operations, by sale or otherwise, in whole or in part at any time.
>
> 10. Establish, increase or decrease the number of work shifts and their starting and/or ending times.
>
> 11. Determine the work duties of employees.
>
> 12. Establish new wage rates for new positions.
>
> 13. Require duties other than those normally assigned be performed.
>
> 14. Select supervisory employees.
>
> 15. Train employees.
>
> 16. Discontinue or reorganize or combine any department or branch of operations with any consequent reduction or other change in the working force.
>
> 17. Introduce new and improved methods of operations, regardless of whether such may cause a reduction in the work force.
>
> 18. Establish, change, combine or abolish job classifications and determine job content and qualifications.
>
> 19. Determine reasonable work pace [sic], work performance levels and standards of performance of the employees, and in all respects carry out, in addition, the ordinary and customary functions of management, all without hindrance or interference by the Union, except as specifically altered or modified by the express written terms of this agreement.
>
> The functions and responsibilities herein reserved are expressly excluded from grievance provisions of the Agreement and failure to exercise any of the functions whether or not expressly stated herein, shall not constitute a waiver thereof.
>
> The foregoing statement of the rights of management and of the Employer functions are not all inclusive, but indicate the type of matters or rights which belong to and are inherent in management, and shall not be construed in any way to exclude other Employer functions not specifically enumerated. Any of the rights, powers, or authority the Employer has when there was no agreement are retained by the Employer and may be exercised without prior notice to and consultation with the Union except those specifically abridged or modified by this agreement and any supplement agreement that may hereinafter be made.

On April 8 Respondent deleted the last two paragraphs of the management-rights clause. Respondent increased its yearly wage increase from 2 to 2.5 percent and then to 2.75 percent, which was part of what it termed its last and final offer. The Union rejected it.

On April 25 and May 26 the parties were assisted by a Federal mediator. Each session lasted several hours. Agreement was reached. Respondent raised its wage increase to 3 percent. Respondent wanted a 1-year contract, the Union wanted a 3-year contract. The parties agreed to a 2-year contract with a wage reopener after 1 year. On June 11, 1988, the unit employees ratified the contract and it was signed effective retroactively to June 1, 1988.

In light of the facts that the parties reached agreement on a first contract after 7 months of negotiations (October 22 to May 26) and after they had met in 13 separate negotiating sessions (neither party failed to show up at any session) and in 2 private meetings between the chief negotiators for each side, and considering that there were no issues which the parties failed or refused to discuss, it is my considered judgment that the General Counsel has failed to show that Re-

spondent negotiated in bad faith in violation of Section 8(a)(1) and (5) of the Act.

IX. BEVERLY MANOR OF READING I, BIRDSBORO, PENNSYLVANIA; TRIAL OF NOVEMBER 15, 16, AND 17, 1988, AND FEBRUARY 23, 1989; CHARGING PARTY IS DISTRICT 1199P

This is the first of two trials involving this facility. The other case is discussed further in this decision.

On November 30, 1984, the Union won an election to represent a unit of service and maintenance employees. The Union was certified on December 10, 1984, and is acknowledged by the parties to be the collective-bargaining agent for the employees for the period relevant to the unfair labor practice allegations.

A. *Information Request*

It is alleged that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to honor an information request from the Union concerning why employees Wendy Frymoyer and Beverly Troxel had been denied enrollment in the health plan offered at the facility. They were denied plan coverage, according to Respondent, because they were overweight. A grievance was filed.

The Union, by letter dated September 9, 1986, requested that Respondent furnish it with the following information to process this grievance:

> (1) Written notice denying Wendy Frymoyer and Beverly Troxel their health and welfare benefits.
>
> (2) Documentation of the criteria used for health and welfare eligibility of Beverly Enterprises' employees, particularly those who enrolled during the open enrollment period.
>
> (3) Documentation of the scale that Beverly Enterprises allegedly used in this case to determine that Ms. Frymoyer and Ms. Troxel are overweight.

On November 12, 1986, the Union, by letter, requested that Respondent furnish it with the following information needed to process the grievance:

> (1) Complete copies of the personnel files of both employees, (i.e., Frymoyer and Troxel) including all records of any and all physical examinations, performance evaluations, job descriptions, attendance records, and all records, forms, applications, and other information pertaining to application for coverage under the Beverly Enterprise Employee Group Health Plan.
>
> (2) A copy of the Summary Plan Description for the Beverly Enterprises Employee Group Plan, including any and all information pertaining to criteria used to exclude employees from coverage under said plan.

It is obvious the the above-requested information was necessary and relevant in order for the Union to perform its function as the collective-bargaining representative of the employees. A union can not tell if employees were properly or improperly denied enrollment in a health plan because of being overweight without a copy of the plan to see if there is an exclusion for overweight employees and on what basis these employees were determined to be overweight. The Union wanted the personnel folders of the two employee to show good job performance and good job attendance in order to demonstrate they were healthy enough to perform well and therefore should be covered by health plan even if overweight.

Respondent's answer on October 30, 1986, to the September 9, 1986 request was not responsive. It forwarded none of the material requested. On January 16, 1987, the Union received a copy of a plan document which was denominated on its face as plan 2. The Union legitimately felt this was incomplete since there was no plan 1 sent to them.

On February 11, 1987, the arbitration hearing was held on this grievance. The Union won the arbitration and the employees were enrolled in the facility health plan. The Union apparently won the arbitration because the plant description did not contain a provision excluding employees from coverage for being overweight.

The Union did not receive the copies of notices denying health benefits on one of the two employee until just a short while before the arbitration hearing and did not receive the other one until the arbitration hearing itself. The Union did not receive the documentation on the scale used until the day of the arbitration. The Union did not receive the personnel files of the two employees until February 9, 1987, just 2 days before the arbitration hearing.

It is apparent that Respondent was so dilatory in responding to these legitimate requests for information that it violated Section 8(a)(1) and (5) of the Act. *Montgomery Ward & Co.*, 234 NLRB 589, 590 (1978).

B. *Failure to Meet and Discuss Grievance*

A grievance was filed on February 4, 1987, by delegate-employee Doris Camilli on behalf of Wendy Frymoyer over a requirement that laundry aides had to wear their hair back. Frymoyer was a laundry aide. She did not handle food. It was alleged by the Union that the rule was implemented to discriminate against Frymoyer for filing the earlier grievance over being refused health plan coverage. The grievance was denied in writing by Administrator Terry Hollinger. The rule requiring laundry aides to have their hair pulled back was promulgated for infection control reasons.

Beginning on March 6, 1987, Union Representative Paul Gottlieb, a full-time union employee, attempted to set up a grievance meeting with Respondent's human resources representative Judy Mollinger. He sent a letter to Mollinger on March 6, 1987, requesting a meeting but never heard back from her. In June 1987 Gottlieb was transferred to another position with the Union and John August, who had previously organized this facility, took over the administration of the contract for the Union.

I note that no employee was disciplined at this facility for failure to comply with the rule requiring that hair be pulled back for infection control reasons.

Judy Mollinger left Respondent's employ in the beginning of 1988. She testified that she received Gottlieb's March 6, 1987 letter requesting she call or write him to set up a meeting concerning this grievance. In April 1987 she put on tape a response to Gottlieb's letter. The tape was never transcribed. Her letter to Gottlieb was never sent. In June 1987 she claims Gottlieb called her on the phone and inquired about what her response was going to be to his March 6, 1987 letter, which had been sent to her 3 months earlier.

Mollinger then discovered for the first time that the tape containing her response had never been transcribed and, indeed, the tape could not even be located.

She prepared a written response, dated June 30, 1987, denying the grievance and mailed it to Gottlieb. She never received a telephone response to her letter of June 30, 1987. Gottlieb had no recollection of speaking with Mollinger in June 1987 on this matter and her letter of June 30, 1987, would have reached the Union after Gottlieb had transferred to a different job.

It seems clear that Respondent, through carelessness and inadvertence, violated Section 8(a)(1) and (5) by failing, rather that refusing, to meet with the Union over this grievance between March 20, 1987 (when they received the Union letter requesting to meet concerning the grievance), and June 30, 1987, when Mollinger replied to the Union's letter. This was not an intentional violation of the Act but a violation nevertheless. *Southern California Edison Co.*, 274 NLRB 1121, 1125 (1985).

C. *Refusal to Rehire Patricia Chroninger*

On March 9, 1987, long after the Union was in place at this facility, Patricia Chroninger, who by the time she testified was married and known as Patricia Shaeffer, began her employment as a nurses aide at the facility. She was in the bargaining unit and signed a dues-checkoff authorization in May 1987.

In June 1987 Chroninger had to have surgery for removal of an ovarian cyst. She thought she would be off from work for only 3 days and asked for and received 3 days off for her operation, i.e., June 17, 18, and 19, 1987. As a relatively new employee Chroninger was not entitled as a matter of right to receive a medical leave of absence. Under the contract between Respondent and the Union an employee had to be an employee for 9 months to qualify for a medical leave of absence as a matter of right. There was nothing, of course, to prevent Respondent, as a matter of largese or compassion, from granting a medical leave of absence to an employee with less than 9 months of employment.

Unfortunately the surgery was more complicated than Chroninger thought it would be and she stayed in the hospital for 5 days and was told by her doctor not to return to work for 4 to 6 weeks. She asked her sister to notify the facility of her medical situation.

On June 26, 1987, Chroninger came into the facility to pick up her paycheck and saw DON Elaine Wally, who had given her the 3 days off. She told Wally that she would be out of work for another 2 to 3 weeks recuperating from surgery. Wally told Chroninger that her paycheck was on station one and that they could not hold her position open any longer and when Chroninger was ready to return to work she should see the administrator about a job.

On July 17, 1987, Chroninger was released by her doctor to return to work. She called DON Wally. Wally told her the facility couldn't hold her position open, had replaced her, but Wally would talk to the administrator about rehiring her.

Chroninger called Union Representative John August, a full-time union employee and at the time of the hearing the newly elected President of District 1199P. August was scheduled to attend a meeting that day with Administrator Terry Hollinger. At the meeting Hollinger told August and Chroninger that he would look into the matter of rehiring Chroninger and get back to them. On July 20, 1987, Chroninger called Wally and Wally told her that she was not going to be rehired because she had violated two company rules, which were in the Employee Handbook, namely, Chroninger visited the facility while not on duty and made personal phone calls to the facility to speak to employees who were, at the time she phoned, not on break or lunch period. The rules actually prohibited employees from receiving visitors during worktime and no calls during worktime unless it was an emergency situation or the employee had permission from a supervisor. Chroninger admits she did call the facility on three occasions and visited the facility twice. She called the facility on June 19, 1987, to tell her coworkers how she was doing following surgery. The first time the phone was busy and the next time she spoke briefly with two employees. She visited the facility to pick up her check on June 26, 1987, and she went to the facility during a week in July to thank her fellow employees on the 11 p.m. to 7 a.m. shift for sending her a get-well card when she was hospitalized. On that occasion she spoke with four employees. She spoke to two of them for about 1 minute each and she spoke with the other two, who were in a patient's room, for possibly as long as 5 minutes. Chroninger credibly testified that in the past other employees visited the facility when they were off duty for a party for example and they were not disciplined in any way.

It was stipulated that between January 1, 1986, and December 31, 1987, not one single employee was disciplined for visiting the facility or telephoning the facility.

On July 20, 1987, when Chroninger was told that she was not going to be rehired a want ad appeared in the local newspaper. In the ad this very facility advertised that it wanted to hire a nurses aide albeit for a shift different from Chroninger's shift.

The issue presented is whether Chroninger was refused reemployment because of her protected concerted activities, i.e., authorizing dues checkoff and pressing a grievance, or whether she was refused reemployment for the reasons Respondent claims. I conclude she was denied reemployment because she engaged in protected concerted activity, i.e., complaining with John August's assistance about getting her job back in a grievance meeting with Administrator Terry Hollinger.

DON Wally testified that she told Chroninger on June 26, 1987, when Chroninger came in to pick up her check, that her job couldn't be held open and she would have to see the administrator about being rehired. Further, that she was not rehired because of her calls into the facility and her visit to the facility after 11 p.m. one night and her refusal to leave right away when ordered to do by charge nurse Tricia Le Van. It is Wally's contention that at least since June 26, 1987, Chroninger was *not* an employee, yet she was refused reemployment for violating rules binding on employees only. In any event, the rules violated by Chroninger were so miniscule that they cannot be the real reason Respondent refused to rehire her. To refuse to rehire an employee who is recuperating from surgery because she calls her colleagues to tell them she made it through surgery okay and and because she comes to the facility personally to thank her fellow workers for sending her a get-well card is so cruel and inhumane that common sense dictates that that cannot be the real reason for the refusal to rehire. Chroninger's bringing in

John August from the Union to fight for her job has to be the real reason. John August, of course, was the very same union official who had organized the facility in 1986. Respondent violated Section 8(a)(3) of the Act when it refused to rehire Chroninger.

Long after the refusal to rehire Chroninger was made and only when Respondent's counsel was preparing for the hearing did it learn that Chroninger, in applying for employment in March 1987 had failed to disclose on her application for employment that she had worked in 1984 at the very same facility. In 1984 she was fired for failing to show up for work: This occurred within 1 month of her being hired. Her failure to disclose her prior employment with Respondent was not a factor in Respondent's refusal to rehire her in July 1987 since they didn't know of it. Therefore, the only significance to it is whether I should recommend that she be denied reinstatement because of it.

I will not recommend that she be denied reinstatement based on her failure to disclose her 1984 employment with Respondent because the record reflects that she was a good nurses aide between March and June 1987. Administrator Hollinger conceded that she was a good employee during that period. Respondent should not benefit from this belated discovery. If Chroninger had been discharged for patient abuse in 1984 I would deny her reinstatement but not for absenteeism. Indeed DON Wally conceded that there is no hard and fast rule prohibiting the rehire of an employee who had previously been discharged. It depends on the circumstances of the prior discharge. Hollinger's self-serving testimony that his own personal rule, which is not in writing, is not to rehire anyone who had been previously discharged is not persuasive.

Since I conclude Chroninger was refused rehire because she concertedly complained with John August about her plight and Respondent had an opening for a nursing aide at the time I will order reinstatement with backpay.

An interesting aspect of this case, alluded to above, is that Respondent takes the position that Chroninger violated rules in an Employee Handbook which handbook applies only to employees yet claims she was not an employee at the time she violated the rules. This seems a bit unfair. There was no evidence to even suggest that patients' rights, dignity, or treatment were in any way adversely effected or compromised by either Chroninger's calls to the facility or her visits to the facility even thought one of the visits was after 11 p.m. As regards charge nurse LeVan's testimony I conclude that Chroninger, when asked to leave at 11 p.m., could have been quicker about it but she was not in any way disrespectful toward LeVan. Between Chroninger and LeVan on what happened that night I find Chroninger more believable.

X. BEVERLY MANOR OF READING II. BIRDSBORO, PENNSYLVANIA; TRIAL ON NOVEMBER 16, 1989; CHARGING PARTY IS DISTRICT 1199P

It is alleged that Respondent violated Section 8(a)(1) of the Act on June 15, 1989, when it announced that it was terminating an attendance bonus program in retaliation for the Union filing a grievance and without first affording the Union prior notice and opportunity to bargain about the termination of the program.

A contract between the facility and the Union was, by its terms, effective from March 16, 1988, to January 31, 1990. During a wage reopener on January 31, 1989, the parties agreed to extend the life of the contract to January 31, 1991. The contract contains a grievance-arbitration clause.

In October 1988, during the term of the contract and because of attendance problems, Administrator Dennis McGowan unilaterally and without prior notice to the Union implemented an attendance bonus program whereby employees represented by the Union would get a cash bonus if they had perfect attendance for a 3-month period. The amount of the bonus was $100 for full-time employees, $50 for part-time employees, and $25 for casual employees. No charge was filed over the implementation of this program and it is not alleged as an unfair labor practice. The 3-month periods were October 15 to January 14, January 15 to April 14, etc. Employees apparently liked the bonus program but did not like the fact that 3 months perfect attendance was necessary to earn the bonus because an employee might miss a day early in the 3-month timeframe due to illness, for example, and could not earn the bonus even though they had perfect attendance for the remainder of the 3-month period.

In response to these concerns, Administrator McGowan, without giving prior notice to the Union and affording it an opportunity to bargain about the matter, unilaterally modified the attendance bonus program. Beginning in January 1989 the size of the bonus would be less but perfect attendance for only 1 month was necessary to earn the bonus. Again no charge was filed over this modification and it is not alleged to be unlawful.

On June 10, 1989, Administrator McGowan posted in the facility a document outlining Respondent's attendance policy and procedures. The Union filed a grievance over the posting of the document claiming that it amounted to the promulgation of new work rules in violation of the procedures for doing so which were outlined in the collective-bargaining agreement. This grievance was settled to the satisfaction of the Union the following month.

Doris Camilli, shop steward, prepared the grievance mentioned above and handed it to Administrator McGowan on June 14, 1989, after she had punched out of work that day. Camilli is positive that it was after 3 p.m. on Wednesday, June 14, 1989, that she handed the grievance to McGowan. She is positive it was June 14, because she remembers that since it was the end of the pay period Camilli, after giving McGowan the grievance, collected timecards for the people in her department and gave those timecards to Butch Williams, her supervisor in the housekeeping department. Camilli impressed me as both a credible and accurate witness.

The following day Camilli learned from some of the her fellow unit employees that a notice had been posted, dated June 15, 1989, terminating the attendance bonus program effective July 12, 1989, for unit employees. The attendance bonus program would remain in effect for all employees of the facility, e.g., department heads, RNs, and LPNs, except those employees represented by the Union. And, the notice terminating the attendance bonus program, was posted the morning after the union files the aforementioned grievance.

On June 26, 1989, a meeting was held between representatives of the Union and Administrator McGowan. McGowan refused to say why he terminated the attendance program for the unit employees.

In an about face Respondent on July 10, 1989, informed the Union that it would not be terminating the attendance bonus program for unit employees on July 12, 1989, as stated in its June 15, 1989 posting. Indeed, the program was still in effect at the time of the hearing in this matter.

When Respondent modified the program in January 1989 by reducing the amount of bonus and reducing the length of perfect attendance necessary to earn the bonus it posted a memo detailing the modifications which contained language that the entire program was subject to change or termination on 4 weeks notice. In spite of that language it would still be a violation of Section 8(a)(1) of the Act if the program were terminated because the employees engaged in the protected concerted activity of filing a grievance.

McGowan testified at the hearing before me that he wanted to modify the attendance bonus program for unit employees but hadn't gotten around to doing so. He posted the notice of June 15, 1989, announcing the termination of the attendance bonus program for unit employees in order to put pressure on himself to come up with a better bonus program for these employees and he announced the termination of the program without any regard whatsoever to the grievance filed by the Union. His testimony is not only unworthy of belief but is an insult to one's intelligence.

If McGowan wanted to modify the program for these employees why didn't he say so in his notice of June 15, 1989? When he met with the Union on June 26, 1989, the termination of the attendance bonus program for these unit employees was brought up for discussion why didn't McGowan tell the Union he wanted to cone up with a better program for them?

McGowan also claims that he did not receive the grievance until *after* he posted the notice of June 15, 1989. On this point I specifically credit the testimony of Camilli over McGowan and find that Camilli gave the grievance to McGowan on June 14, 1989, *before* he posted the June 15, 1989 notice of termination. It is inconceivable that Camilli, who resigned in November 1989 as shop steward, but remains an employee would not have known that the termination notice was posted prior to filing the grievance. The grievance was signed not only by Camilli but by 21 other unit employees. I am sure that McGowan knew even *before* June 14, 1989, that a grievance was forthcoming over the posting of the attendance policy and procedure document. McGowan wrote on the grievance that he received it in June 15, 1989, at 3:05 p.m. which would be subsequent to the posting of the termination notice I find that McGowan either deliberately or inadvertently wrote down the wrong date.

I find that Respondent posted the notice terminating the attendance bonus program for employees of the facility represented by the union and no others because a grievance was filed by the Union. This is a violation of Section 8(a)(1) of the Act, even though Respondent wisely reversed field and did not terminate the program. *Precision Graphics*, 256 NLRB 381 (1981).

XI. CARPENTER CARE CENTER II, TUNKHANNOCK, PENNSYLVANIA; TRIAL ON NOVEMBER 13 AND 14, 1989; CHARGING PARTY IS DISTRICT 1199P

A. *Failure to Bargain over the Bonus Program*

This is the second case involving this facility. Since December 10, 1987, the Union has represented a unit of LPNs.

In March 1989 the parties entered into a collective-bargaining agreement effective retroactively from November 3, 1988, to January 31, 1990. There is nothing in the contract which authorizes Respondent to unilaterally implement a bonus for LPNs who work 12-hour shifts.

Because of a need for additional professional staff, i.e., RNs and LPNs, Respondent, by Administrator Donna Connery, who had replaced Administrator Andrew Durako (see Carpenter Care Center I) sent a letter on November 29, 1988, to Adele Snyder, at the time a full-time employee of the Union. The letter stated:

> This is to inform you that due to the need of additional professional staff at Carpenter Care Center, I have instituted a bonus program for those professional staff who work twelve hour shifts. In addition to the time and a half, they will receive thirty five dollars for every twelve hour shift worked.
>
> This is a temporary program until such time as the vacancies may be filled. If there are questions please contact me.

It is clear from this letter that Connery was announcing a fait accompli and not giving the union prior notice of a proposed change and the opportunity to bargain about that proposed change. In point of fact the bonus program remained in effect until January 31, 1989, when it was terminated. The bonus program applied to RNs, who were not represented by the union, and LPNs, who are represented by the Union. The subject matter of bonuses for working extra hours is a matter of mandatory collective bargaining and Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the bonus program without giving prior notice and opportunity to bargain to the Union. *NLRB v. Katz*, 369 U.S. 36, 742–746 (1962). The announcement of a fait accompli to the Union is not enough.

The General Counsel was not required, in order to make out its case, to prove that an LPN received the $35 bonus prior to the letter to the Union announcing the implementation of the program in its November 29, 1988 letter but they tried anyway with the testimony of Lisa Jumper. Jumper was honest but simply mistaken when she testified that she received a $35 bonus for working a 12-hour shift *prior* to the November 29 letter. I find as a matter of fact from the documentary evidence that she worked the 12-hour shift for which she received the bonus in January 1989 and not November 1988.

B. *The 8(a)(1) Threat to Candy Smith*

Candy Smith, a very credible witness, was a nurses aide at the facility from February 1988 to August 1989. In Janu-

ary 1989—some 2 months before the parties reached agreement on a collective-bargaining agreement—the Union took a strike vote. The unit employees voted in favor of a strike and Respondent was so informed. In point of fact the employees never did go on strike.

After receiving notice of the strike vote Administrator Donna Connery held a meeting with employees at which she wanted to ascertain how many employees would go on strike and how many would work. This is not alleged as an unfair labor practice. What is alleged as an unfair labor practice is a threat to employee Candy Smith that if she went on strike she would not be able to visit her ailing and elderly grandmother who was a resident in the facility.

Connery told the assembled employees that if they went on strike they could not enter the facility. Smith asked if she could visit her grandmother and was told no and when she pressed further and asked if she could visit her grandmother if her grandmother took a turn for the worse she was again told by Connery that she could not see her. I credit Smith's testimony which is for the most part corroborated by Connery herself.

It is clear to me that it is a threat in violation of Section 8(a)(1) of the Act for a supervisor to tell a young woman that if she exercises her Section 7 right to strike that she may never see her grandmother alive again. *Crest Mark Packing Co*., 283 NLRB 999, 1012 (1987). Connery was legitimately concerned about possible sabotage in the facility but should have let Smith know that special precautions may be necessary when she visited her grandmother, e.g., she would be escorted. But to let Smith believe that even if her grandmother took a turn for the worse that she still could not visit her obviously would tend to have a very inhibiting effect on Smith's decision to exercise her Section 7 right to strike or not.

XII. SMITHVILLE CONVALESENT CENTER, SMITHVILLE, MISSOURI; TRIAL ON SEPTEMBER 20 AND 21 AND NOVEMBER 14, 1989; CHARGING PARTY IS SEIU 96

Since May 28, 1986, the Union has represented a unit of service and maintenance employees at this facility. The parties did not agree on a contract, however, until October 1987.

A. *Failure to Meet and Discharge Grievances with Union*

Respondent acknowledges its duty under the law to meet and discuss grievances with the Union even in the absence of a collective-bargaining agreement containing a grievance-arbitration clause.

On December 19, 1986, Union Representative Sherwin Carroll sent two grievances to Administrator Gordon Dille at the facility. They concerned the subject matter of the facility's infection control policy and training given employees in the use of restraints on residents. On January 7, 1987, Carroll called Dille about the two grievances since he hadn't heard anything from the facility. Dille told Carroll he would not meet on the grievances because there was no contract in effect.

On January 12, 1987, Carroll sent seven more grievances to Dille at the facility. These grievances concerned reports for certified nurses aides, unequal distribution of work load among certified nurses aides, unsanitary conditions in vending machines, unavailability of food for night-shift employees, two unjust writeups of an employee, and cancellation of scheduled mandatory meetings. The only response from Respondent was that the grievances were merely returned by mail to the Union without even a cover letter. The envelope returning the grievances was received by the Union on January 20, 1987. Carroll called Dille who said he (Dille) would not and could not meet with the Union concerning these grievances because there was no contract in effect.

About 2 weeks later Respondent had a change of heart and decided to meet with the Union and discuss these grievances. Respondent wrote a letter, dated January 26, 1987, in which it said it would meet with the Union. This meeting took place thereafter on February 12, 1987. Respondent argues, among other things, that even if there was a violation of the Act in refusing to meet on the grievances right away it was a de minimus violation since the parties met on February 12, 1987, to discuss all nine grievances.

In light of the extensive violations of the Act by Beverly, I do not find this violation de minimis. Respondent violated Section 8(a)(5) of the Act in refusing on January 7, 1987, to meet and discuss two grievances submitted on December 19, 1986, and Respondent violated the Act in refusing on January 20, 1987, to meet and discuss the seven grievances filed on January 12, 1987. *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987). The Union filed a charge with the NLRB on January 21, 1987, over Respondent's refusal to meet and discuss these grievances and it was apparently the filing of this charge that caused Respondent to change its mind about meeting with the Union on these grievances.

B. *Right of Access*

In January 1988, after the first collective-bargaining agreement between this facility and the Union went into effect, Virgil right was assigned by the Union to be the individual to service this facility.

Article 15 of the contract contained a union visitation clause which provided as follows:

> An official representative of the Union will be permitted to visit the nursing home to ascertain that the provisions of the Agreement are being observed and to confer with employees covered by this Agreement during their nonworktime and in nonwork areas. Such visits shall not interfere with the operation of the nursing home or the performance of employees' duties, and the Union representative shall inform the administrator or director of nursing services of his visit either prior to or upon entering the nursing home's premises. The Union will furnish the name of the authorized representative and the Employer is obligated only for admission of such authorized representative. Access to the nursing home during all work hours for the above stated reasons shall not be unreasonably denied. The foregoing visitation privilege does not include or allow the holding of Union meetings on the nursing home premises, without regard to whether a Union representative does or does not attend.

This clause was in the first contract covering this facility which ran from November 1987 to November 1988 and is in the subsequent contract which runs from November 1988

to November 1990. It is so-called ''Accord'' language, that is, there was an accord or agreement reached between Beverly and the SEIU which accord provided standard language for many noneconomic clauses to include the union visitation clause. This same language is in many contracts between the SEIU or its locals and various Beverly facilities.

In January 1988 Virgil Wright came to the facility. He was told by the administrator that he could only meet with employees in a room denominated as ''N West Lobby'' on Respondent's diagram of the facility. This space was referred to in the hearing as the ''north west conference room'' but is a lobby with doors to the outside.

This space is used for nurses' reports between shifts but otherwise remains unused. It has a table, a chair, and a couch. It is on a wing of patients' rooms. The employees, when on break or lunch, congregate in the breakroom which is far removed from the ''room'' provided to the Union. All the vending machines are in the break area which contains 2 long tables and 15 or 20 chairs. Smoking is allowed in the break area.

No employees met with Wright when he used the room in January 1988. In February 1988 the same thing happened.

On May 3, 1988, when Wright came to the facility he demanded that he be allowed to use the breakroom and went in to use the breakroom for his visit. He was told he was not allowed to use the breakroom. DON Jan Clark came into the breakroom and told Wright he had a phone call. Wright spoke with Rod Panyik, Respondent's regional labor and industrial relations representative, on the phone. Panyik told Wright that if he didn't leave the break area Respondent would call the police. Wright left the facility.

On May 19, 1988, Wright again went into the break area. Respondent called the police and Wright received a summons for trespassing.

On June 2, 1988, Wright again went into the break area and on this occasion he was again told that he had a phone call. This time it was Abe Emery, another regional labor and industrial relations representative, who told Wright he could use the breakroom that day for his visit but in the future he had to use the ''room'' provided by management.

Prior to using the breakroom Wright complained to management that the ''room'' they provided was inadequate, e.g., out of the way, no employees came to the room, no smoking permitted, etc.

On June 23, 1988, Wright went to the break area again for his visit and Respondent again called the police. Wright was escorted from the facility.

On July 15, 1989, Wright once again went to the break area. Respondent called the police. Wright received a second summons.

In court on July 20, 1988, the judge dropped the cases against Wright and urged the parties to settle the matter consistent with Federal labor law.

Between July 20, 1988, and July 1989 Wright visited the facility 12 or so times. In each and every case he stayed in the break area and did not use the ''room'' provided by Respondent. Respondent took no action against Wright during this time.

Between mid-August 1989 and the beginning of September 1989, after a new administrator, Teresa Lillibridge, arrived at the facility, Wright came to the facility on one occasion and when he entered the breakroom he was told he had to leave and go to the ''room'' provided by Respondent or leave the facility. The Police were called for the fourth time and escorted Wright out of the facility.

Abe Emery testified that the union visitation clause is in effect at many facilities and he knew of only one, in Charlotte, North Carolina, where the union representative was allowed to use the break room when he visited the facility and that was because there was no place else to meet.

In rebuttal the General Counsel called two credible witnesses, Jayne Netchler and Dale Ewart, who are both union representatives. Hetchler testified that she was aware of four Beverly facilities with the same union visitation clause as we have here. Those facilities are in Minnesota and Wisconsin and she visited those facilities on a regular basis and was allowed to use the break room. Ewart testified that he visited 19 Beverly facilities in Michigan with the same union visitation clause in the contract as we have here and in each and every facility he used the breakroom for his visits.

The ''room'' provided by Respondent to the union at this facility was clearly inadequate, e.g., it is a lobby and not a real room, it was very small and no employee on break went there because it was so out of the way. There was no smoking permitted either. Even conceding that Respondent did receive complaints from non union employees and supervisors that they did not like the union representative in the breakroom when they took their breaks the fact is that the union rep would be in the breakroom on only 1 day a month and even then for only a couple of hours.

In short, when Respondent denied the union representative the right to use the break area and when it called the police to remove the union representative from the break area on four occasions it violated Section 8(a)(1) of the Act. *Gilliam Candy Co.*, 282 NLRB 624 (1987); *Holyoke Water Power Co.*, 273 NLRB 1369 (1985).

Any argument that the dispute regarding access should be deffered to the arbitral process under *United Technologies Corp.*, 268 NLRB 557 (1984), is not persuavise because before a dispute is deferred to the arbitral process there must be a long and productive collective-bargaining relationship. There, obviously, wasn't such a relationship in this case.

XIII. HILLCREST CONVALESCENT CENTER, PASCO, WASHINGTON; TRIAL ON NOVEMBER 7, 1989; CHARGING PARTY IS TEAMSTERS 839

On January 12, 1987, the Union filed an election petition seeking to represent a unit of service and maintenance employees. The campaign started on January 26, 1987, and ended with the Union being rejected in a Board-conducted election on February 27, 1987.

During this campaign Respondent conducted its normal mini in-service training on Tuesdays and Thursdays. All employees attended either the Tuesday mini in-service or the Thursday mini in-service. Full in-service meetings were held much less frequently or about once a month. In-service meetings are essentially training sessions. During the election campaign three things changed about the mini in-services: (1) they were longer, (2) the Union was discussed, and (3) Administrator Betty Deymonaz, rather than the director of nursing (DON) or someone else, presided over these mini in-service meetings.

Two nurses aides, neither of whom is still at the facility, testified about statements made by Administrator Deymonaz.

It is alleged that these remarks violated Section 8(a)(1) of the Act. The two nurses aides are Robin Sellers and Laura Fields. I found both of these witnesses to be very credible. Although Fields was fired by Respondent before she testified in front of me she testified consistent with her affidavit which was prepared before her discharge. Insofar as Respondent's witnesses Rita Lorraine McMahon and Betty Deymonaz are contradicted by Sellers and Fields, I credit Sellers and Fields and not McMahon and Deymonaz.

It was uncontradicted that the work force at this facility was made up for the most part of single women with children.

Sellers testified that Deymonaz had told, indeed stressed, to employees at most of the mini in-services that the employees would definitely go on strike because Beverly won't reduce profits to pay better wages, that when (not if) a strike occurred the employees would be required to go on strike, the striking employees would be replaced, the Union would help the employees for only a while and the employees were asked by Deymonaz at these meetings how could they take care of their families? This is a threat of loss of jobs if employees select a union hence a violation of Section 8(a)(1) of the Act. *Norco Products*, 288 NLRB 1416 (1988).

According to Sellers, Deymonaz also said that if the Union was selected and it becomes too troublesome for Beverly, Beverly will simply sell the facility. This is a threat of loss of jobs if employees select a union and hence a violation of Section 8(a)(1) of the Act. *Norco Products*, supra.

According to Sellers, Deymonaz also told the employees that once the Union gets in the employees would never be able to get rid of it.

According to Sellers, Deymonaz repeatedly said that if Beverly had to negotiate it wouldn't agree to anything and it won't budge. This is a threat also in violation of Section 8(a)(1) of the Act. The employees were being told it would be futile to select the Union.

According to Laura Fields, Deymonaz more than once stated that if the Union was voted in and negotiations began Respondent would reduce wages to minimum wage and employees would lose accrued sick leave and vacation. Even Respondent's witness Rita Lorraine McMahon testified that negotiations would start at ground zero. Start at minimum wage and no benefits. Deymonaz admitted she said negotiations start at zero. This is a threat in violation of Section 8(a)(1) of the Act. *Norco Products*, supra. Deymonaz stressed at the meetings attended by Fields that if the Union got in there *would* be a strike and employees would be replaced and thereby lose their jobs. This a threat in violation of Section 8(a)(1) of the Act.

During the campaign Respondent handed out literature on a number of occasions to its employees. In virtually all the literature introduced into evidence at the hearing those in favor of bringing in a union were constantly referred to as ''union pushers.'' Drugs are a horrible scourge in America today and to call those in favor of a union ''union pushers'' brings to mind the phrase ''drug pushers.'' This is not alleged as of violation of the Act and I'm not saying it is but it suggests the depth of Respondent's hatred of the Union at least at this facility.

XIV. DUKE CONVALESCENT CENTER, LANCASTER, PENNSYLVANIA; TRIAL ON NOVEMBER 14, 15, 16, AND 17, 1988, AND FEBRUARY 23, 1989; CHARGING PARTY IS PSSU 668

In January and February 1987 the Union undertook a campaign to see if there was interest among the employees at this facility to join a union. Union organizer Diane Topakian visited the private residences of approximately 24 employees. Among those visited at home was nurses aide Lucille Lucas. There were a few meetings at the homes of some employees.

In February 1987 the Union concluded that there was insufficient interest among the employees and ceased their organizing efforts. The Union did not demand recognition and did not file a petition for an election.

It is alleged that during this union campaign Respondent committed a number of classic 8(a)(1) violations and violated Section 8(a)(3) when it discharged Lucille Lucas.

A. *The 8(a)(1) Violations by Administrator Sharon Aukamp*

Mary Zook, who quit Respondent's employ prior to her testimony, credibly testified that she attended staff meetings in February 1987 at the facility where the Union was discussed. DON Joan Noble and ADON Glenn Thomas were present along with a number of nursing assistants.

She heard Administrator Sharon Aukamp say that if employees were caught talking about the Union on the job they would be terminated immediately. This violates Section 8(a)(1) of the Act.

Alvina Ogbonna, who was fired for absenteeism prior to her testimony and who also appeared to have a bad memory, testified that she attended a meeting along with other employees in February 1987 where Administrator Aukamp told the assembled employees that if they were caught talking about the Union they would be immediately terminated. In spite of her bad memory and in spite of the fact that she was later fired for absenteeism I found Ogbonna's demeanor to be that of a truthful person and she was testifying about something that would be important to her, i.e., a threat of loss of employment. I credit her testimony as to what Aukamp said.

Lucille Lucas also credibly testified that at a meeting with employees Aukamp told the employees that if they were caught talking about the Union they would be fired on the spot.

I do not credit the testimony of Aukamp who denied she said what Zook, Ogbonna, and Lucas testified she said.

ADON Thomas was at the meetings where Aukamp said that if employees were caught talking union they would be immediately discharged. He said Aukamp never said this. I don't believe him.

The statements heard by Zook, Ogbonna, and Lucas were unlawful threats in violation of Section 8(a)(1) of the Act.

B. *The 8(a)(1) Violations by ADON Glenn Thomas*

Mary Zook credibly testified about three conversations with ADON Glenn Thomas. A couple of weeks after the meeting where Administrator Aukamp told the employees not to talk union on the job Thomas told Zook don't be caught talking about the Union.

On a second occasion Thomas asked Zook if she knew anything about the Union. She said no.

On a third occasion Thomas warned Zook again not to be caught talking union and told her that a list of prounion employees was being maintained and the persons on that list would be terminated at the end of the day.

No one was fired that day but Lucille Lucas was fired a week or two later. These statements to Zook constitute unlawful threats and interrogation in violation of Section 8(a)(1) of the Act. There is no evidence that Zook and Thomas had any relationship other than employee and boss. *Rossmore House*, supra.

A week or two before she was fired Lucille Lucas spoke with Glenn Thomas in his office. He asked what she knew about the Union. This is unlawful interrogation in violation of Section 8(a)(1) of the Act. On another occasion Thomas told Lucas he thought she knew more about the Union than she was admitting. Again, Lucas' only relationship to Thomas was one of employee and boss.

I do not credit ADON Thomas' denial that he ever said what Zook and Lucas claim he said.

C. *The 8(a)(1) Violations by Charge Nurse Roberta Huger*

On a Thursday during the organizing campaign, Charge Nurse Roberta Huger, who is admitted by Respondent to be an agent and supervisor, approached nursing aide Lucille Lucas on the floor. Huger told Lucas that Administrator Aukamp had a meeting with the LPNs and wanted to know who among the aides was prounion.

Huger asked Lucas if she was prounion. Lucas said yes and Huger told Lucas she was also prounion. Huger in telling Lucas what Aukamp said created the impression that Aukap and the LPNs were watching over the aides to see if they were for or against the Union, i.e., they would be under surveillance in violation of Section 8(a)(1) of the Act. Huger did not testify.

D. *Discharge of Lucille Lucas and 8(a)(1) Conduct By DON Joan Noble*

Lucille Lucas was visited in her home by union organizer Diane Topakian in January 1987. Lucas attended two union meetings.

I believe that Respondent knew that Lucas was prounion. Charge Nurse Huger, who did not testify, had been told by Lucas that she (Lucas) was prounion. She could have passed the information on to Aukamp who wanted it.

ADON Glenn Thomas admits that he and Lucas discussed the Union and she asked questions about the Union He knew that she had spoken with a union organizer because a charge nurse named Elana Neely told him so.

On February 17, 1987, Mary Zook did not come to work and as a result the aides who were at work had to do Zook's work as well as their own work. One of the other aides was Fern Nagle. Suffice it to say Lucas and Nagle argued loudly about their work assignment that day. Charge nurse Glenda Pitts told them to stop arguing. They continued. ADON Thomas heard the commotion and came out of his office. Residents in the facility were in a position where they could hear the argument between Nagle and Lucas. Thomas told Lucas that he was tired of hearing her tell Nagle what to do. Lucas asked Nagle and another nearby aide in Thomas' presence if she told them what to do and they both said no. Lucas had started to cry and said to Thomas in a loud voice that she didn't tell the other aides what to do.

Thomas told Lucas to go home. Lucas went to see Administrator Aukamp instead. Thomas told Aukamp that Lucas told him she didn't have to take orders from him. Lucas denied she said that. One of Respondent's witnesses, charge nurse Glenda Pitts, said that after Thomas told Lucas and Nagle to stop arguing Nagle became quiet but the very upset Lucas argued then with Thomas. She did not testify that Lucas told Thomas she didn't have to take orders from him.

The decision to discharge Lucas was made by ADON Thomas and approved by Administrator Aukamp.

In January 1987 Lucas received her work performance evaluation. She received an overall rating of ''satisfactory.'' Nagle received her work performance evaluation in November 1986. Her overall rating was ''satisfactory'' and ''needs improvement.'' Nagle received a written warning for arguing loudly in front of patients and other employees for her actions on February 17, 1987. Lucas was fired for her actions which were described as insubordination to charge nurse Pitts and ADON Thomas.

Lucas was the only employee disciplined at this facility for insubordination between January 1, 1986, and December 31, 1987. Essentially, Nagle and Lucas did the same thing with respect to the charge nurse with Lucas also arguing with the ADON.

I am convinced that Respondent discharged Lucas rather than give her a written warning because of her activity on behalf of the Union. I don't credit Aukamp's testimony that she didn't know Lucas was prounion. In any event, the decision to terminate Lucas was made by ADON Thomas and ratified or approved by Administrator Aukamp. It is clear to me that Thomas believed Lucas to be prounion. As noted above he knew she had spoken to the union organizer and Lucas had asked him about the Union.

The discharge of Lucas was overkill. A written warning similar to the one given Nagle would have been more appropriate. Lucas received the death penalty of the work place because Respondent knew of her sentiment in favor of the Union. Under the *Wright Line*, supra, rationale conclude that Respondent would not have fired Lucas but for her prounion posture.

A key piece of evidence is the testimony of Carolyn Dixon, who testified for the General Counsel, was a reluctant witness, and is still an employee at this facility. Dixon credibly testified that she had a conversation with DON Joan Noble right around the time that Lucas was fired and when Noble was still DON at the facility. Noble, in a very low voice, asked Dixon if employee Alvina Ogbonna was having meetings with the Union. Dixon feigned surprise and said that Ogbonna wouldn't do that because she needs her job. Noble, in a very low voice then said, according to Dixon, ''Well, if she is, you talk to her, Carolyn, for God's sakes tell her not to do that because she will lose her job.'' In her affidavit which Dixon thought might be more accurate than the testimony before me she related that Noble said, ''If she is, for God's sake, tell her not to because she could get fired.'' Either version is devastating to Respondent and circumstantially not only tends to establish illegal motivation in the discharge of Lucas but tends to prove that the unlawful statements attributed to Aukamp, Noble, Thomas, and Huger

were made by them. Dixon testified that ADON Thomas and charge nurse Roberta Huger were at the table when Noble spoke to Dixon, however, there is no conclusive evidence they heard what Noble said in a low voice to Dixon.

There is no doubt in my mind that Respondent discharged Lucas in violation of Section 8(a)(3) of the Act.

While I found Lucas to be generally credible, I do not credit her testimony that on the day she was fired she was told it was because of the Union and that she was asked for the names of prounion employees. With all due respect to Lucas, I just don't find that very believable. One factor used in assessing credibility is the reasonableness or unreasonableness of the testimony. I just don't find that testimony reasonable. A factfinder can, of course, chose to credit part of a witness' testimony and not to credit other parts of that same witness' testimony.

XV. YORK TERRACE NURSING CENTER, POTTSVILLE, PENNSYLVANIA; TRIAL ON NOVEMBER 16 AND 17, 1988; CHARGING PARTY IS DISTRICT 1199P

At all times material, the Union represented a unit of service and maintenance employees at this facility. A collective-bargaining agreement was in effect between the parties which ran by its terms from October 1, 1985, to January 31, 1988. It contained a grievance and arbitration clause.

William Yanonis was the union representative responsible for administering the contract at this facility.

He heard from some employees in December 1986 that their work schedules had changed during the Thanksgiving holiday period. In addition, an employee named Nancy Frisch had been disciplined for alleged abuse of sick leave. Grievances were filed over both matters.

On December 22, 1986, Yanonis met with Administrator Arlene Postupak at the facility to discuss these grievances.

One of the grievances alleged that when Nancy Frisch was discharged she did not have a union representative with her.

In writing Yanonis requested a copy of the work schedule for December 1, 1986. He did this because it was alleged by Respondent that Union Representative Lauri Rossi was present when Frisch was disciplined on December 1, 1986. The Union did not believe Rossi was even working that day.

With respect to the grievance over changing holiday schedules Yanonis requested in writing copies of work schedules for all departments covering all holidays enumerated in Section 19.1 of the contract for the years 1984, 1985, and 1986. Section 19.1 of the contract enumerates six holidays to include Thanksgiving Day. Yanonis requested this information because the employees were contending that the scheduling for Thanksgiving 1986 was done differently from the way it had been done in the past and Respondent was maintaining there had been no change in the practice of holiday scheduling. Administrator Postupak was claiming that they did the Thanksgiving 1986 holiday scheduling the same way they always did it.

Postupak said upon receiving the union request that she would check with Corporate and get back to him. She also said that the holiday schedules for 1984, 1985, and 1986 were available.

On December 31, 1986, at another meeting at the facility Postupak handed Yanonis a written reply to his request for information. It stated simply ''Schedules are management property, and will not be furnished. Art 4, 6, 34.'' Article 4 is the management-rights clause, article 6 is the dues-checkoff clause, and article 34 is the so-called zipper clause. Nothing in any of the three clauses specifically addresses the issue of releasing schedules to the Union.

The Union filed charges with the NLRB. Thereafter, on February 19, 1987, Philip E. Berlin, counsel for Respondent, sent Yanonis a letter claiming the request for information was too burdensome and unreasonable and offering to settle the information request by asking them to let him know what information the Union would be willing to accept in satisfaction of the request. In late March 1987—after Respondent and the Union had communicated with one another—Respondent turned over the scheduling information requested for calendar 1986 but not the scheduling information for 1985 and 1984. The grievance over holiday scheduling was eventually settled and withdrawn from arbitration.

The question is was the information request by the Union on December 22, 1986, for necessary and relevant information which the Union would need in order to carry out its duty of fair representation toward the employees it represented. The answer is obviously yes. When Respondent on December 31, 1986, in writing and by its Administrator Postupak categorically refused to turn over any of the requested information it violated Section 8(a)(5) of the Act.

Postupak candidly admitted that she was inexperienced in labor relations matters and it showed. Possibly the union request was overly broad but most of the information requested was clearly relevant and necessary. Respondent's flatout refusal to turn over anything is what gets Respondent in difficulty.

Once Attorney Berlin got involved the matter was handled in an appropriate fashion. Since Berlin got involved in February 1987 the question is raised as to whether Respondent's categorical refusal to turn over any of the information requested in December is de minimis since Berlin began working out a compromise within 2 months of Postupak's refusal. I think in light of the numerous unfair labor practices committed by Respondent that this was not de minimis. If this was an isolated event then maybe but it isn't isolated by a long stretch.

Accordingly, I find that Respondent, by Administrator Postupak, in refusing to turn over any of the information requested or even offering to discuss a compromise violated Section 8(a)(5) of the Act since the information sought was necessary and relevant to the Union in carrying out its obligations to fairly represent the unit employees in their grievances. *Montgomery Ward & Co*., 234 NLRB 588 (1978).

XVI. STROUD MANOR, EAST STROUDSBURG, PENNSYLVANIA; TRIAL ON FEBRUARY 21 AND 23, 1989; CHARGING PARTY IS DISTRICT 1199P

At all times material, the Union represented a unit of service and maintenance employees at this facility. The parties had agreed to a collective-bargaining agreement effective by its terms from October 1, 1985, to September 30, 1987. The agreement contained a grievance-arbitration clause.

In June 1986 Judy Klinger, who had been the night cook in the dietary department, was promoted to a supervisory position, i.e., assistant dietary services supervisor. According to dietary aide and union delegate Nancy Norsworthy she continued to do unit work as a cook.

Norsworthy and a number of other unit employees filed a grievance on October 6, 1986, objecting to a supervisor, Klinger, doing unit work.

The grievance was denied at step 1 by Dietary Manager Sue Hughes. The grievance was pursued by the Union to step 2, i.e., taken up with the administrator at the facility, Mary Lou Shannon, who denied the grievance on November 12, 1986.

On December 29, 1986, the Union formally made a demand for arbitration under the contract. By January 8, 1987, the Union had notified Industrial Relations Representative Judy Mollinger of Norsworthy's grievance being pursued beyond step 2 and had also sent a copy of the grievance to Mollinger. Mollinger claims she didn't get a copy of the grievance. Mollinger impressed me as being unusually disorganized and I can readily believe that she believes she never got the grievance but not through any fault of the Union. Mollinger should have called the facility and asked them to send her a copy of the grievance.

In late January 1987 Union Delegate Norsworthy asked Administrator Shannon for work schedules in connection with the grievance. Shannon told her to write to Beverly's Industrial Relations Representative Judy Mollinger in Rockville, Maryland, and gave Norsworthy Mollinger's address. On January 20, 1987, Norsworthy with Union Vice President Yanonis' approval wrote to Mollinger and asked for ''a copy of all work schedules six months prior to Judy Mollinger's appointment to her new position, and continuing until our case comes before arbitration.''

On February 17, 1987, Mollinger wrote to Norsworthy that the request for information will only be honored if it comes from an official union advocate of record and will only be sent to that person.

The information sought was not turned over until the very day of the arbitration hearing, i.e., May 6, 1987, close to 4 months after the information was first requested in writing and only after the Union had gotten a subpoena from the arbitrator seeking production of that information on May 6, 1987. Mollinger, who as noted above impressed me as being disorganized, claims that some but not all the information was turned over before the arbitration hearing date of May 6, 1987. I don't credit her testimony on this point.

At the arbitration hearing on May 6, 1987, the Union and Respondent submitted stipulated facts to the arbitrator and he issued a mediated award.

In order to properly represent employees when the issue is whether a supervisor has improperly done unit work to the detriment of unit employees it is necessary and relevant for the Union to have the schedules they requested in January 1987. Respondent's delay in turning this information over to the Union until the very day of the arbitration hearing itself and after Respondent had received a subpoena violates Section 8(a)(5) of the Act. *Montgomery Ward & Co*., supra.

XVII. MEYERSDALE MANOR, MEYERSDALE, PENNSYLVANIA; TRIAL ON DECEMBER 5, 6, 7, 8, AND 9, 1988; CHARGING PARTY IS DISTRICT 1199P

A. *Overview*

The Union began an organizing campaign at this facility in December 1986 although Respondent believed the Union was organizing as far back as September 1986. An election was held among a unit of service and maintenance employees on February 6, 1987, which the Union won. The Union was certified by the Board late in February 1987. Negotiations for a contract began shortly thereafter. A contract was eventually agreed on in August 1987 and ran by its terms from August 12, 1987, to January 15, 1989.

It is alleged that even prior to the formal beginning of the union organizing campaign Respondent fired LPN Suzanne La Framboise because it believed she was engaging in prounion activity. It is also alleged that several supervisors and agents of Respondent violated Section 8(a)(1) of the Act when they either interrogated or threatened employees or created the impression among employees their union activity was under surveillance. Subsequent to the election it is alleged that Respondent unlawfully disciplined dietary department employee Patricia Spangler and that Respondent bargained in bad faith and also made unilateral changes in terms and conditions of employment without giving prior notice and opportunity to bargain to the Union.

B. *Discharge of LPN Suzanne La Framboise*

In 1985 certain employees of this facility, to include Suzanne La Framboise, walked off the job to protest working conditions. Administrator Gerald Brown was aware of this at the time La Framboise was fired on October 15, 1986.

In September 1986, 17 employees at Respondent's Fayette Health Center in Uniontown, Pennsylvania, were fired (see sec. II, above, which addresses this and other allegations of unfair labor practices at Fayette Health Care Center). Uniontown is not very far from Meyersdale and employees at this facility were sent to Fayette to fill in for the discharged employees. This facility's administrator, Gerald Brown, came to the belief that because the Union was organizing at Fayette that it would attempt also to organize at this facility. Indeed certain employees, according to Brown, told him this was the case.

Prior to La Framboise's discharge Brown admits and it is corroborated by DON Cheryl Lohr that he told La Framboise that he believed she was trying to get the Union in at the facility and if she didn't stop she would be fired. He admits he said this to her and thought he legally could because he thought that La Framboise as an LPN was part of management. He was wrong.

La Framboise worked the 11 p.m. to 7 a.m. shift. She received a written warning in March 1986, which was long before either the beginning of the union organizing campaign or even any belief by Respondent that a union organizing campaign might be underway. The written warning was for failing to call a resident's doctor when there was a change in the resident's condition. As it turned out the resident had suffered a stroke. La Framboise back in November 1985 had received an oral warning for failing to attend a mandatory staff meeting. La Framboise has no defense to the November 1985 oral warning but claims with respect to the March 1986 written warning that she did call a doctor to report the resident's change in condition but she claims she called the wrong doctor. Respondent claims she never called any doctor. Regardless of which version is correct La Framboise was in the wrong. Suffice it to say these two disciplines are outside the 10(b) period.

In early October 1986 there was another incident involving a second resident. This resident's initials are EF. In order to

protect the privacy of patients or residents at the various facilities they were for the most part referred to in this litigation by their initials and not by name.

Resident EF complained during the night of extreme pain on her right side. She also had difficulty catching her breath, and coughed up bloody mucous.

The protocol at the facility was for the LPN to call the doctor on call or the registered nurse (RN) on call if there was a change in the condition of a resident. The highest rated personnel on duty during the midnight shift were the LPNs. EF was La Framboise's patient. Instead of calling the doctor or RN on call to report the change in condition La Framboise, having determined that EF's vital signs were okay and that Tylenol seemed to help EF's breathing, consulted with the two other LPNs on duty, i.e., Beverly Murphy and James Miller. They agreed with La Framboise that the situation was not serious enough to warrant calling either the doctor or RN on call.

When they day crew arrived it was determined rather quickly that patient EF should be seen by a doctor and EF was taken by ambulance to a nearby hospital. She was returned to the facility later that day. No serious harm had come to EF as a result of the delay in her being seen by a doctor.

On October 7, 1987, La Framboise received a written warning for this incident from DON Cheryl Lohr. La Framboise then went on a previously scheduled vacation for several days. When she returned on October 15, 1987, she was told she was being discharged because of this incident and her prior record. Administrator Gerald Brown concurred in the decision to discharge her but the discharge decision was made by Regional Manager Joel Kamp, who did not testify. Kamp made the decision based on information supplied by Administrator Brown and DON Lohr.

It is my conclusion that La Framboise was discharged not because of her handling of the EF situation which looks bad but rather because of Respondent's belief that she was engaging in union activity. Brown had warned her that she would be fired if she didn't stop it. I base this conclusion, in part, on Respondent's antiunion animus as reflected in the numerous 8(a)(1) violations committed at this facility and also based on the fact that the other two LPNs on duty with La Framboise that night and with whom she consulted and who agreed with her that it was not necessary to call the doctor or RN on call were *not* disciplined in any way whatsoever. Murphy and Miller did not even receive an oral warning for essentially the exact same failure to act as that of La Framboise. The fact that EF was La Framboise's patient and not their patient doesn't explain the wide disparity in treatment between discharge (the capital punishment of the work place) and no discipline at all. Given Respondent's antiunion animus, its threat to discharge La Framboise, and its disparate treatment of La Framboise as compared to Murphy and Miller I am forced to conclude under the *Wright Line*, supra, analysis that La Framboise's discharge was in violation of Section 8(a)(3) of the Act.

C. *The 8(a)(1) Conduct Administrator Gerald Brown*

When employees for this facility had gone in September 1986 to work as replacement workers for the ''Fayette 17'' who had been fired union organizer Tom De Bruin had spoken with a number of them.

Administrator Brown became aware of this and anticipated De Bruin would try to organize the employees at his facility.

On September 23, 1986, a meeting of 3 to 11 p.m. shift employees was held. Nursing Aide Sylvia Wagner attended and credibly testified to what was said. Brown ran the meeting. He said, among other things, that a union comes in over his dead body, the facility will be closed before any union is allowed in and then no one will have a job. These are threats in violation of Section 8(a)(1) of the Act.

A few days later at another meeting in a third floor treatment room conducted by Administrator Brown and DON Lohr, Brown unlawfully interrogated employees, to include Sylvia Wagner, when he asked the employees how they felt about the Union. Brown went on to say if the Union got in employees would lose benefits. This interrogation and threat violated Section 8(a)(1) of the Act.

On December 22, 1987, Brown created an impression of surveillance when he asked Sylvia Wagner, in the presence of nurses aide Lisa Durst, how the party had been at her house. Wagner asked what party are you talking about and Brown said don't be so innocent. In point of fact Wagner had recently held a union meeting at her house with several employees and union organizer Tom De Bruin in attendance. There hadn't been any ''party.'' Brown's statements created the impression of surveillance of employees' union activity by Respondent and violates Section 8(a)(1) of the Act.

Suzanne La Framboise credibly testified that at a meeting with employees on September 25, 1986, at about 5:30 a.m. Brown told employees he heard someone from La Framboise's shift was trying to bring in a union and he went on to say that Beverly sells homes before they let a union into them. This is an unlawful threat. Employee Lisa Durst credibly testified that when Brown said this he was looking directly at La Framboise. Brown and DON Lohr met privately with La Framboise after this meeting and Brown told La Framboise that if she continued to organize she would be fired. This is an unlawful threat. Brown admitted he made this threat.

On September 26, 1986, Brown told La Framboise that he knew that employees had met at Sheets, a local convenience store, with the union organizer. In doing so Brown violated Section 8(a)(1) of the Act by creating the impression among employees that their union activity was under surveillance.

On September 27, 1987, according to the credited testimony of La Framboise and Sheets' employee Sharon Smith and basically admitted by Administrator Brown, Brown called Sheets' employee Smith and asked her if any of the employees of the facility were at Sheets or had been at Sheets talking to the union organizer. This is unlawful surveillance of employees' union activity and a violation of Section 8(a)(1) of the Act. Smith told several employees when they came into Sheets that their boss had called checking up on them.

Lisa Durst, a 7 a.m.–3 p.m. shift nurses aide, credibly testified that at a meeting with employees Brown said that he'd shut the facility down before he'd let a union in.

Employee Sherry Brant also heard Brown say the same thing and further that the Union would get in over his dead body. Employee Delores Hostetler also remembers Brown saying that the Union would get in only over his dead body.

Brown approached Hostetler after the meeting where he said the Union would get in only over his dead body and un-

lawfully interrogated her in a one-on-one situation when he asked her if she knew or had heard anything about the Union.

Brown admits he had at least one staff meeting with employees where the Union was discussed. He denies, however, that he ever said the Union would get in only over his dead body, that the facility would close before it would go union, or that Beverly sells homes before they let in a union. He also denies that he even asked employees how they felt about the Union. He also denied asking Wagner about a party at her house and telling her not to look so innocent.

I heard and observed the General Counsel's witnesses and I heard and observed Brown. I credit the General Counsel's witnesses over Brown. I simply do not believe his denials. The General Counsel's witnesses impressed me as honest people.

D. *The 8(a)(1) conduct of DON Cheryl Lohr*

On December 22, 1986, when employees handbilled at Respondent's facility DON Cheryl Lohr on seeing off-duty employee Brenda Martz giving a handbill to one of the other employees coming off work yelled at Martz and told her she was not on worktime, that she was trespassing and she should get off the facility's property. The handbill itself was a copy of the charge filed by the Union with the NLRB protesting the discharge of Suzanne La Framboise. A piece of paper was affixed to the door of the employees' entrance to the facility informing employees that they were not to be on facility property more than a half hour before their shift started or more than a half hour after their shift ended. Management called the police. When the police arrived Administrator Brown demanded that the handbillers be arrested for trespassing. No one was arrested. Balancing the Section 7 rights of employees to handbill during an organizing campaign against the property rights of Respondent it is clear that the latter right yields. It was a violation of Section 8(a)(1) of the Act for DON Lohr to prohibit peaceful handbilling on December 22, 1986, and for Administrator Brown to demand of the police that they arrest the handbillers. *Jean Country*, 291 NLRB 11 (1988). There is no evidence, I note, that anyone was impeded in their efforts to get in or out of the facility by the presence of the handbillers.

It is alleged that a day or so earlier employees were told that a 7-minute rule was going to be put into effect, i.e., an employee can't be on facility property more than 7 minutes before or 7 minutes after shift. This rule was never implemented. Instead the 30-minute or half-hour rule was put into effect.

On February 6, 1987, the election was held. The Union won. Nurses aide Lisa Durst credibly testified that on January 16, 1987, only a couple of weeks before the election DON Cheryl Lohr and she had a conversation. Lohr unlawfully interrogated Durst in violation of Section 8(a)(1) of the Act by asking her why did she need a Union and what could a Union do for her.

E. *The 8(a)(1) Conduct by Human Resources Representative Hugh Gregg*

Sylvia Wagner credibly testified that Human Resources Representative Hugh Gregg at a meeting in October 1986 surveyed the employees about conditions at the facility and told the employees he was doing the employee survey earlier than normal because of the presence of the Union. Gregg did not testify. This is not a violation of the Act. There were no threats and it was only arguably an unlawful solicitation of grievances not because the survey was taken (which was normal operating procedure) but because it was taken somewhat earlier. I do not consider this to be an unfair labor practice.

According to employee Delores Hostetler Gregg claimed that all the Union does is take your money. This is not a threat but rather ''free speech'' within the meaning of Section 8(c) of the Act.

F. *Written Warning to Patricia Spangler*

Patricia Spangler, a dietary department employee and a member of the union negotiating team, attended a negotiating session on the night of August 5, 1987, and the early morning hours of August 6, 1987. The negotiations involved this facility and two other Beverly facilities. Agreement on contracts was reached at approximately 5 a.m. after an all night negotiating session that began at 6 p.m. the night before. The Federal mediator present at the session told the employees in the early morning hours that if the employees found a replacement they could have the next day off.

Spangler credibly testified and was corroborated by Sylvia Wagner that she (Spangler) tried to call her supervisor, Debbie Savage, at home two times to tell her she was too tired and would not be coming to work that day at 11 a.m. as scheduled. There was no answer at the number Spangler called.

At 6 or 6:15 a.m. Spangler started the 1-1/2-hour drive back to the Meyersdale area from the site of the negotiations. Spangler drove and her coworkers Sylvia Wagner and Lisa Durst were passengers.

Under Respondent's policy if unable to report to work an employee had to call in at least 2 hours before his or her shift begins so the facility can locate a replacement otherwise the employee is in violation of the 2-hour call-in rule. It was also policy, at least in the dietary department of this facility, that an employee had to have permission from Supervisor Savage to switch with another employee, i.e., an employee couldn't take a fellow employee's shift without Savage's okay.

After dropping off her fellow employees after the drive back to the Meyersdale area in a heavy fog Spangler was too tired and wiped out to go to work. She tried calling Savage again around 8:20 a.m. without success. She then called the dietary department and told a coworker that she would not be in to work that day. Before 9 a.m. she called the facility again and this time got to speak to Savage. She told Savage the same thing. Savage told Spangler it would be put down as an absence but didn't specify excused or unexcused. In its position letter to the Board dated October 27, 1987, Respondent claims Spangler was disciplined because she didn't call in 2 hours or more before the start of her shift. At the hearing Respondent claims Spangler was disciplined because she didn't show up for work and didn't find a replacement.

The next day when Spangler reported to work Savage told her that her day of absence was going to be a day of unexcused absence rather than an excused absence and she was given a written reprimand.

Three months earlier Spangler had found her own replacement when she had missed work and was told never to get her own replacement without Savage's prior okay.

Suffice it to say Respondent gave a written warning to Spangler because of her union activity. While the mediator told the employees that they could have the day off if they got a replacement Spangler was from a department where she was instructed not to get her own replacement without Savage's approval. In addition, Spangler was too tired to work. Having been up all night and being wiped out due to the drive home in the fog Spangler was taking off because she was physically unable to work. In the ordinary course of employment an employee at the facility, if physically unable to work, could call in sick at least 2 hours before start of the shift. Spangler did this. She tried three times to get hold of Savage without success, called her department and said she wouldn't be in and even reached Savage before 9 a.m. to tell her she would not be in to work at 11 a.m. On the phone just before 9 a.m. Savage told Spangler she would not get paid for this absence and this was understood by Spangler because employees did not get paid for *excused* or *unexcused* absences. When Respondent later denominated her absence as unexcused and gave her a written reprimand it is obvious it was done because of Spangler's union activity in violation of Section 8(a)(3) of the Act. Savage claims she didn't know of Spangler's union activity but admits that Spangler told her when she called that she had been up all night at the negotiating session. Savage claims she told Spangler on the phone that the absence would be unexcused if she couldn't find a replacement but I don't believe her I credit Spangler's version of the conversation. Spangler impressed me as an honest person. Spangler would have been able to go to work but for her protective concerted activity of attending an all night negotiating session as part of the union bargaining team.

Spangler no longer works for Respondent but the reprimand should be removed from her file and not held against her if she applies in the future for employment at any Beverly facility.

G. *Unilateral Changes*

In late July 1987 after the Union was certified as collective-bargaining representative for the service and maintenance employees but before the parties had agreed to a contract Respondent unilaterally and without giving prior notice to the Union implemented a change in the hours worked in the laundry and dietary departments. The charge being that Respondent implemented ''swing shifts.'' This was in late July 1987. Although the parties were negotiating for a first contract Respondent merely implemented this ''swing shift'' change in hours for the two departments mentioned. The parties thereafter reached agreement on a contract. The remedy for this unilateral change should be to make whole any employees adversely affected by the change. This was a clear-cut violation of Section 8(a)(5) of the Act to which Respondent presented no defense. *W. A. Kruger Co.*, 299 NLRB 914 (1990).

H. *Failure to Bargain in Good Faith*

The Union was certified in February 1987 and the Union's chief negotiator, Ashley Adams, communicated with Respondent's chief negotiator Judy Mollinger. They agreed to meet in mid-March to negotiate contracts for three of Respondent's facilities to include this facility. The March meetings had to be canceled due to a serious automobile accident that Mollinger had in the New England area. See sections 1 and 2, Beverly Manor of Monroeville and Fayette Health Care Center, supra.

The parties did meet once in April 1987, twice in June 1987, twice in July 1987, and once in August 1987. By July they knew they had a contract.

Possibly Respondent should have been in a position to replace Mollinger with another negotiator but they did not. Under all the circumstance, however, it is my conclusion as noted above in the sections of this decision discussing Beverly Manor of Monroeville and Fayette Health Care Center that the delay was not so egregious that it amounted to bad-faith bargaining in violation of Section 8(a)(5) of the Act.

XVIII. RICHLAND MANOR, JOHNSTON, PENNSYLVANIA; TRIAL ON DECEMBER 12, 13, AND 14, 1988; CHARGING PARTY IS DISTRICT 1199P

A. *Overview*

An election petition was filed for a unit of service and maintenance employees on February 20, 1987. An election was held on April 3, 1987, and the Union won. Respondent filed objections. The election was set aside because of vandalism, which was not attributed to either side, by the Board and a new election was ordered on August 13, 1987. A second election was held on September 11, 1987. The Union lost the election. The Union filed objections, which they later withdrew. A third election was held on November 18, 1988. The Union won the election and was certified by the Board as exclusive representative for collective-bargaining purposes of a unit of service and maintenance employees.

It is alleged that during the campaign periods preceding the first election on April 3, 1987, and the second election on September 11, 1987, that various 8(a)(1) violations were committed by supervisory personnel of the facility or higher headquarters and that an employee, Deborah Altemus, was issued a less favorable performance evaluation and later fired because of her prounion activities.

B. *The 8(a)(1) Violations by Administrator Kevin Williams*

On March 12, 1987, Administrator Kevin Williams spoke with employee Anne Clifford, who worked in the dietary department, and unlawfully interrogated her about a petition which was signed by her and other employees and distributed which petition stated that the employees wanted to have a fair election. Williams queried Clifford over the phone as to what is a fair election. This is unlawful interrogation in violation of Section 8(a)(1) of the Act. *Rossmore House*, supra.

Williams at a meeting with employees in February 1987 announced that if an employee went to a mandatory meeting and it went past his or her normal quitting time he or she was to put in for overtime. This was a change from the way things were done before and was a calculated attempt to get employees to vote against the Union hence an unlawful promise in violation of Section 8(a)(1) of the Act.

Williams announced prior to the April 3, 1987 election (the first election) that since the Union could contact employees at home, etc., that prounion literature could no longer be

posted on the bulletin board in the break area. All sorts of other items were permitted to be posted to include antiunion literature posted by the Respondent. This disparate and discriminatory rule violates Section 8(a)(1) of the Act.

In September 1987 just prior to the second election, Williams announced that if employees worked through all or part of their lunchbreak, i.e., had a ''short lunch,'' they would get paid. This change from past practice was announced just days before the second election and was an unlawful interference since it was the giving of a benefit at a time calculated to influence the employees to vote the way management wanted them to vote.

Arnold Long, who was fired for failing to disclose that he had been previously fired from another nursing home for patient abuse, testified that he spied on the union activities of his fellow employees at the request of Williams and Regional Manager George Dayoobe. I found Long to be incredible. I give no weight whatsoever to his testimony. He didn't sound credible and was destroyed on cross-examination.

C. *Section 8(a)(1) Violations by Regional Manager in Training George Dayoobe and Human Resources Representative Ray Martinize*

Just days before the second election on September 11, 1987, Regional Manager in Training George Dayoobe and Human Resources Representative Ray Martinize, who were present at the facility to assist the administrator in Respondent's campaign against the Union, conducted two meetings with employees. At both meetings Dayoobe told employees they would be getting uniforms and an uniform allowance. This promise of a benefit on the eve of the election violates Section 8(a)(1) of the Act.

D. *The 8(a)(1) Violations by Dietary Manager Connie Clement*

In mid-February 1987, Dietary Manager Connie Clement told dietary department employees that she knew they had all signed union authorization cards and were 100 percent for the Union. This created an impression of surveillance because indeed just a few days before all dietary employees had gone to a union meeting at a local Quality Inn and had signed union authorization cards. Creating the impression of surveillance violates Section 8(a)(1) of the Act.

Because of a state requirement the rules at the facility called for the doors to the kitchen, where the dietary employees worked, to be closed and access limited to dietary employees and management. In point of fact the doors were kept open and nursing aides and others routinely entered the kitchen to get coffee for residents, etc. Right after announcing that she knew that 100 percent of the dietary aides had signed authorization cards Clement ordered that the doors to the kitchen be kept closed. This was prior to the first election and was obviously done, when past practice and timing are considered, in order to interfere with dietary employees telling other employees, such as nurses aides, to vote for the Union. It was a violation of Section 8(a)(1) of the Act. If there was any doubt about it I note that shortly after the election the doors to the kitchen were permitted to remain open because the cooks were complaining about the terrible heat in the kitchen. There was no state requirement calling for access to the kitchen to be limited to dietary employees and management.

Prior to ordering the doors closed, Clement had told dietary aides Anne Clifford and Delores Thomas that they would lose benefits if the Union got in the facility.

E. *The 8(a)(1) Conduct by DON Nancy Reed*

Nurses aide Sharon Leonard ''marched on the boss'' with fellow employees, i.e., she went to the facility with other employees, met with management, and demanded that the Union be recognized. In addition Leonard was quoted in a local newspaper and appeared on television critical of the facility, e.g., she stated there was not enough staff and that employees needed a union.

Sometime, thereafter, on March 26, 1987, Leonard was wearing colored socks and had her pants legs rolled up as she rinsed off with a hose pads soiled by incontinent residents of the facility. She was doing this in an area where neither residents nor the families of residents could observe her. DON Reed saw Leonard and called her to her office where she threatened to give Leonard a written reprimand for violation of the facility dress code. The dress code requires white socks and that pants legs be rolled down *but* Leonard's pants legs were rolled up for a good and obvious reason (to avoid getting them wet) and Leonard had worn colored socks in the past, been observed doing so by management and nothing was even said. Leonard was threatened with discipline shortly before the election because of her protected concerted activity in violation of Section 8(a)(1) of the Act. She did not, however, ever receive written discipline for this incident.

In a one-on-one conversation between nurses aide Terri Cekada in mid-February 1987, prior to the first election, DON Reed told Cekada that if the Union got in she might not continue to get weekends and personal days off. Further, she told Cekada that Beverly really doesn't care about little homes like their facility and might close the facility if it went union. She showed Cekada a newspaper article which reported that Beverly had recently sold 80 homes. These are all threats in violation of Section 8(a)(1) of the Act.

F. *Alleged 8(a)(1) Violation by Human Resources Representative William Corville*

On February 27, 1987, at a meeting where employees expressed concern about staffing at the facility Human Resources Representative William Corville said that he could remedy staffing problems and not the Union. I do not consider this statement to amount to a violation of Section 8(a)(1) of the Act.

G. *The 8(a)(1) Violation by Housekeeping Supervisor Joe Lee*

Shortly before the second election in September 1987 Housekeeping Supervisor Joe Lee had a conversation with housekeeping aide Roberta Vasbinder. Lee told Vasbinder that he had been talking with Regional Manager in Training George Dayoobe and Dayoobe had told him that the employees should get a pay raise. Vasvinder was credible and Lee never testified. This was violation of Section 8(a)(1) of the Act since it was an illegal promise of a benefit.

H. *Less Favorable Performance Evaluation and Discharge of Deborah Altemus*

Deborah Altemus was employed as a dietary aide and later as a relief cook at this facility from June 10, 1985, to September 17, 1987, when she was fired shortly after the second election. She was brought back to work on October 17, 1987, and resigned on January 1, 1988. The allegations involving Altemus concern her first period of employment. She was, of course, in the dietary department which was 100 percent prounion according to DON Nancy Reed and Dietary Manager Connie Clement.

Her first performance evaluation covered the period June to September 1985, a 90-day period because she was a new employee. Her overall rating was ''satisfactory.'' Her second performance evaluation covered the period September 1985 to June 1986 and she was rated ''very good.'' The third performance evaluation covered the period June 1986 to June 1987, part of which period, i.e., February 1987 to June 1987 covered the first campaign and election which the Union won. Her evaluation was ''needs improvement.'' Altemus credibly testified she doesn't know where her overall performance went down. She was not told that because of a ''needs improvement'' rating she would be reevaluated in 90 days. On September 17, 1987, she received a performance evaluation covering the June to September 1987 period. Once again the rating was ''needs improvement'' and she was fired.

Respondent tries to justify the discharge on grounds of absenteeism and poor work. Altemus' worst absenteeism was 12 days during a period she was rated ''very good.'' She was absent 13 days during the period she was rated but she had a doctor's excuse for each and every absence. Prior to her first ''needs improvement'' rating she was never told that her overall performance was deteriorating or her job at jeopardy.

Altemus was in the department that was believed by Respondent's management to be 100 percent prounion. Altemus not only signed an authorization card but handbilled the facility and was observed by Administrator Williams doing so. She also signed 2 petitions along with 25 or so other employees which petitions were very prounion and which petitions were given to Respondent's management. Anne Clifford, a cook in the dietary department, even overheard Dietary Manager Connie Clement referred to Altemus as a good worker in August 1987.

Suffice it to say Altemus' lower performance evaluation and her discharge were done in violation of Section 8(a)(3) of the Act because of Altemus' protected concerted activity on behalf of the Union. Altemus' only prior discipline was an oral warning for not wrapping some condiments after a meal in June 1987. Respondent returned Altemus to work on October 17, 1987, and although it intended to pay her backpay it never did. This can be remedied in the compliance stage of the proceeding if it has not already been remedied.

XIX. STENTON HALL NURSING CONVALESCENT CENTER, PHILADELPHIA, PENNSYLVANIA; TRIAL ON FEBRUARY 22 AND 23, 1989. CHARGING PARTY IS DISTRICT 1199C

It is alleged that Respondent violated the Act in two ways with respect to this facility, i.e., it violated Section 8(a)(5) by failing and refusing to execute a collective-bargaining agreement between December 9, 1986, and April 7, 1987, and that on July 13, 1987, it violated Section 8(a)(5) when it unlawfully imposed restrictions on the activities of union delegates in the facility.

By way of background, I note that an election was held on February 7, 1986, which the Union won. The Union was thereafter certified to represent a unit of service and maintenance employees.

A. *Failure and Refusal to Execute the Collective-Bargaining Agreement*

Negotiations began for a first contract between these parties in February or March 1986. The chief spokesman for the Union was Donna Ford, executive vice president and representative. The chief spokesman for Respondent was Judy Mollinger, human resources representative. In so far as there is conflict in the testimony between Ford and Mollinger I credit Ford, who impressed me not only with the precision of her testimony but her demeanor. Mollinger, while basically honest, impressed me as a witness in this part of the case as in others as a person who was in over her head and was unable to keep track of all the many responsibilities she had. She was harried, overworked, and disorganized. She is no longer an employee of Respondent.

Mollinger told Ford that she (Mollinger) was fully authorized by Respondent to negotiate and agree to a contract with the Union regarding the service and maintenance unit at this facility.

The next to last negotiating session was August 21, 1986, at the offices of the Federal Mediation and Conciliation Service in Philadelphia. The parties were interested in reaching their goal of a contract and worked the entire day and into the next day. They finally broke at 3 or 4 in the morning. Mollinger told the Union that she had to get an okay on wages from corporate headquarters in California and the parties recessed until 9 a.m. on August 22, 1986. The parties reconvened and by 4 p.m. had a complete contract. Mollinger and Ford agreed to meet on Saturday, August 23, to initial terms agreed to and put the agreement in draft form. They met at 10 a.m. and completed their task around 11 p.m. They went through all the language and initialed off on each clause. Some of the clauses they agreed to were handwritten by Ford and some were handwritten by Mollinger. Suffice it to say they had an agreement in draft form.

Thereafter, on September 1, 1986, Mollinger wrote Ford advising her that some language was inadvertently left out of a clause on wages. Ford took the position that the language needed no clarification. Mollinger wrote Ford on October 9, 1986, and said lets put in clarifying language and finalize the contract ''upon which we agreed August 22, 1986.'' Mollinger also wanted confirmation that the contract had been ratified. In fact, the contract was ratified in August 1986 and the administrator of the facility so advised.

New employees were being hired at an hourly wage higher than the hourly wage of employees already working at the facility. The contract was not to be effective until it was executed. Ford was horrified at this and wanted the contract signed and made effective as soon as possible so that, among other reasons, employees could get the raises called for in the contract Ford and Mollinger agreed to in August. The Union wrote a letter to Mollinger on December 9, 1986, en-

closing copies of the contract and asked that Respondent execute the contract.

Eventually, Ford and Mollinger met in Philadelphia in early February 1987. Mollinger was accompanied by one of her superiors. The wage proposals agreed to on August 22, 1986, and signed off on by both Ford and Mollinger on August 23, 1986, were as follows:

> Section 1, Wages for the period August 22, 1986 through August 21, 1987:
>
> (a) all current employees past probation whose hourly rate as of August 22, 1986 is less than $4.20 per hour shall have their hourly rate adjusted to $4.20 effective August 22, 1986.
>
> (b) All employees who [sic] continuous service is greater than one (1) year as of August 22, 1986 shall receive an additional ten cents (10¢) per hour effective August 22, 1986.
>
> C. Effective August 22, 1986 through and including August 21, 1987 each employee shall receive a wage increase of three percent (3%) based on his hourly rate on the employees annual employment anniversary date.
>
> d(1) Effective August 22, 1986 the minimum entry hourly wage rate for all bargaining unit classifications except the cook classification is $4.10 per hour.
>
> (2) On completion of the ninety (90) day probation period an employee shall receive an increase of 10 per hour making the job rate $4.20 per hour.

Respondent's proposal at the February 1987 meeting was that section 1,b, set out above, be modified to read:

> (b) All employees whose continuous service is greater than one year and whose hourly rate is more than $4.20 per hour as of August 22, 1986 shall receive an additional ten cents (.10¢) per hour increase effective August 22, 1986.

The Union in order to get the contract signed agreed to a 5-cent rather than a 10-cent-an-hour raise for employees with more than 1 year and less than 2 years on the job.

The parties, thereafter, on March 11, 1986, signed the contract. It is clear the Respondent un}awfully failed and refused to execute the contract it agreed to on August 23, 1986, until the Union agreed to modify it. This is a violation of Section 8(a)(5) of the Act.

B. *Imposition of Restrictions on Union Delegates*

The collective-bargaining agreement between the parties refers to union representatives and union delegates. Union representations are employees of the Union and not employees of the facility. Union delegates are employees of the facility and are the functional equivalent of shop stewards.

Article VIII of the agreement effective August 22, 1986, to August 21, 1988, is entitled ''Union Activity and Visitation.'' It provides as follows:

> *Section* 1.
>
> The authorized representative(s) of the Union shall have reasonable access to the Employer's premises for the purpose of conferring with the Employer, delegates of the Union and/or Employees during non-work time and in non-work areas, and for the purpose of administering this Agreement. When a Union representative enters the Employer's premises he shall notify the administrator or person in charge of his visit so that his activities do not interfere with patient care or the efficient operation of the Home. No more than two (2) Union representatives shall visit the facility at any time unless the parties mutually agree otherwise. The Employer will not unreasonably withhold permission from the Union representative to accomplish the purpose of his visit. The Union will furnish the name of the authorized representative. The Union representative(s) may meet with scheduled employees during their breaks and/or meal periods.
>
> *Section* 2.
>
> Delegates of the Union shall be permitted to furnish information, police the terms of this Agreement, process grievances and perform related duties of mutual concern to the employees and the Union. In no event shall the delegates interfere with the operations of the Employer. The Union shall advise the Employer in writing as to the identity of the Delegates.
>
> *Section* 3.
>
> Employees elected as Union delegates shall be permitted to attend regular delegate assembly meetings, providing that employer operations shall not be impaired and the Employee can schedule the time off.
>
> *Section* 4.
>
> When a delegate finds it necessary to enter a department of the Employer in the course of the performance of his duties as a delegate, he shall first secure the permission of his supervisor, and when he arrives in the other department will secure the permission of that department head or designee. Such visit shall not interfere with the operation of the Employer.
>
> *Section* 5.
>
> A delegate will be provided areasonable and necessary time off from his assigned schedule of work, while involved in the manner provided in the grievance procedure, provided such time off does not interfere with the operations of the Employer. The delegate shall advise his supervisor of the grievance and make an appointment with the appropriate supervisor at a mutually agreeable time. The delegate will report back to his immediate supervisor when his part in the grievance has been completed.
>
> *Section* 6.
>
> The Employer will furnish a bulletin board for the use of the Union in communicating with employees. Official Union notices containing no inflammatory comment may be posted as soon as the Union representative has notified the facility administrator of an intent to post such notice. Notices or literature other than that for the normal conduct of the Union's business must first have the Employer's approval.

On July 13, 1987, the administrator of the facility, Veronica Scicchitano, sent a memo to the two union delegates, i.e., Daisy Franklin and James Bennett. The memo provided, in part, as follows:

> The Union Delegates are permitted to discuss union activities with employees only during non-work time and in non-work areas. You have recently been seen violating the policy. Continued violations could result in future disciplinary action.''

Article VIII of the contract contains no such language restricting the activities of union delegates other than the following: ''In no event shall the delegates interfere with the operations of the Employer.''

At no time prior to issuing this memo did Respondent advise the Union that it wished to renegotiate the matter.

Administrator Scicchitano testified that the director of nursing told her that one of the delegates, Daisy Franklin, was discussing the Union with another employee while that employee was giving direct care to a resident of the facility. As a result the administrator issued the July 13 memo.

It is clear that the July 13 memo modified the contract with respect to the ability of union delegates to do their job. The board prohibition on the activity of union delegates in the memo, e.g., no discussion of union activities except in nonworktime and in nonwork areas, limited the flexibility of union delegates who under the contract are permitted to carry out their duties anyway they feel is necessary, provided they do not interfere with the operations of the facility. Under the memo union delegates are unduly restricted since there are only two delegates and the lunch and break times of employees and delegates will necessarily differ. It could be that some employees would never be off duty on break or lunch at the same time as either of the union delegates.

In issuing the July 13 memo without first getting agreement from the Union Respondent violated Section 8(a)(5) of the Act. The memo should be rescinded.

XX. AND XXI. NORTH PARK MANOR, MEADVILLE, PENNSYLVANIA, AND GREENE HEALTH CARE CENTER, WAYNESBURG, PENNSYLVANIA; TRIAL ON JANUARY 23, 24, 25, AND 26, AND FEBRUARY 23, 1989; CHARGING PARTY IS SEIU 585

These two facilities were sold by Beverly. The sales were effective on December 31, 1987, but Meritcare, Inc., the purchaser, took over control and management of the facilities on September 15, 1987, pending finalization of the sales. At each facility the Union represented a unit of service and maintenance employees and at each facility it is alleged that Respondent when requested to engage in effects bargaining failed and refused to do so.

Subsequent to the sale, the new owner, Meritcare, Inc., recognized the Union and collective-bargaining agreements were signed between the Union and Meritcare.

At the North Park Manor facility it is also alleged that three unit employees, Jeraldine Bubna, Mable Dart, and Joyce Kircher, were discriminated against because of their union activity.

I will first address the allegations of unlawful actions against the three North Park Manor employees.

A. *Discharge of Jeraldine Bubna*

Jeraldine Bubna, a nurses aide, worked at North Park from 1980 until her discharge for excessive absenteeism on November 21, 1986. Her work performance was rated ''very good'' for the periods December 1983 to December 1984 and December 1984 to December 1985. A ''very good'' rating is second only to an ''outstanding'' rating. She signed a union authorization card, wore a union button, had a prounion sticker on the bumper of her car, and was noted by management at the facility as being prounion and as being so prounion that Respondent would not be able to change her mind. This rating by management was done in writing prior to the union election in October 1986, which the union won. Seven weeks later this ''very good'' employee was fired for excessive absenteeism.

Bubna had a medical excuse for her absences but Respondent's policy was to discipline for excessive absenteeism whether the employee had a good excuse, e.g., doctor's slip, or not. This policy was put into effect on July 23, 1986.

The question then is whether the policy on absenteeism was enforced in a discriminatory manner, i.e., enforced only or more strictly against union supporters. The absenteeism policy was adopted just 5 days before the Union notified North Park, in writing, that it was attempting to organize its work force. It was issued long after the Union started its campaign, which was back in January and February 1986. It seems clear that this draconian policy was adopted not only to solve the staffing problems at North Park but also as a weapon to employ against prounion employees. It is so cruel that a facility dedicated to providing care to those in need would not employ such a policy absent a reason in addition to a concern about staffing.

Not only did Bubna have a doctor's excuse for missing work due to illness but the doctor, who furnished the note, Dr. Susan Matthews, was a doctor who was often in this facility attending to the medical needs of the facility's elderly residents. Dr. Matthews, in her note, wrote that because of Bubna's pneumonia she was instructed by Dr. Matthews not to return to work and further she should not, as long as she was suffering from pneumonia, especially not work in a nursing home. Bubna was off work with a doctor's excuse and the doctor, who treated residents in this facility, was advising that if Bubna went to work she would be endangering the health of the elderly residents of the facility. Under these circumstances no humane person would fire Bubna, who was ill and who if she went to work and helped the facility staffing problem would endanger the health of the facility residents, unless they had an ulterior motive. Considering all the evidence, the facility had an ulterior motive, i.e., get rid of this union supporter. The discharge of Jeraldine Bubna was violative of Section 8(a)(3) of the Act.

B. *Removal of Administrative Duties and Subsequent Transfer of Mabel Dart*

Mabel Dart was the employee who first called the Union and requested that it organize the facility. She attended union organizing meetings in January and February 1986. She was the union observer at the election on October 3, 1986, which the Union won. She was a member of the union organizing team and the facility was notified in a letter dated August 20, 1986, that Dart and 10 other employees demanded that

Respondent recognize the Union. Dart and 10 other employees, to include Joyce Kircher, but not Jeraldine Budna, signed this letter. After the election she served on the union bargaining committee and was a shop steward. She was prounion and Respondent knew it. Prior to the election Respondent rated her in writing as ''prounion.''

Her duties were to assist John Hilson, who was retained by the facility as a physical therapist. Dart's work performance rating was ''outstanding.'' ''Outstanding'' is the facility's highest rating.

In December 1986, approximately 2 months after the election, Dart was stripped of certain administrative duties, which consisted of helping the front office in the billing associated with the physical therapy department. She was stripped of these duties because of her position with the Union. Administrator Tim Cimbalnik admitted in his testimony in Respondent's case that this was the reason she was stripped of those duties. Prior to his testimony physical therapist John Hilson testified in the General Counsel's case. Hilson credibly testified that Cimbalnik told him that the reason he removed those duties from Dart was because he didn't want Dart to know too much about the income of the facility since she was active on behalf of the Union and negotiations were beginning for a collective-bargaining agreement.

Several months later, in March 1987, when negotiations were under way, Dart was transferred out of the physical therapy department and assigned as a general duty nurses aide. Respondent claims it did so because of staffing needs. I think otherwise. For one thing, Dart was replaced as an assistant to the physical therapist by another aide even though Hilson thought Dart to be an outstanding assistant. As a result of the transfer Dart had to work more weekends than in her old position.

It is clear that Dart had administrative duties removed from her and was transferred because of her protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

C. *Two Disciplinary Warnings to Joyce Kircher*

Joyce Kircher was prounion and Respondent knew it at the time she was disciplined. Her latest evaluation which covered the period December 1985 to December 1986 was ''very good,'' second only to an ''outstanding'' rating. Kircher had also signed with Mabel Dart and eight other employees a letter to Respondent, dated August 20, 1986, demanding recognition of the union. Prior to the October election Respondent rated Kircher in writing as prounion. Subsequent to the October 1986 election Rircher was on the union negotiating team along with Mabel Dart.

On January 20, 1987, Kircher received an oral warning, reduced to writing of course, for failing to call in sick 2 or more hours before the start of her shift on January 2, 1987. Kircher's shift started at 7 a.m. Since she was calling in ill she was required to do so by 5 a.m. or earlier. The oral warning from DON Jean Drake states that Kircher called in at 5:20 a.m. Kircher credibly testified that she was ill but hoping she would begin to feel better and be able to work. She was up and awake before 5 a.m. and made it a point to call by 5 a.m. and not much earlier because she wanted to call in sick if necessary in a timely fashion or hopefully feel better and be able to go to work and be paid. She called at 5 a.m. and spoke to nurse Phyllis Beardsley. Beardsley did not tell Kircher when Kircher called her that it was after 5 a.m.

Beardsley testified in Respondent's case. She claims she wrote down on a piece of paper the time Kircher called (she claims she was looking at the clock) but waited a full 1-1/2 hours before she ever noted in writing on the proper form that Kircher had called in sick. She threw away the original scrap of paper. Beardsley had a terrible memory concerning the matter and had great difficulty reading her own writing. Indeed, in looking at Beardsley's note it is difficult to determine if she wrote 5:30 a.m. and someone wrote 5:20 a.m. over it or vice versa as the time when Kircher called in sick.

DON Jean Drake relied on the note prepared by Beardsley up to 1-1/2 hours after Kircher called in when deciding to write up Kircher. Kircher claimed she called at 5 a.m. Drake testified that in the event of a dispute she relied on the word of the professional, in this case, LPN Beardsley.

Drake's ready acceptance of Beardsley's version of what happened over Kircher's was prompted by Respondent's wish to ''get'' this very prounion supporter. Any fair minded person who, faced with the facts of Kircher saying 5 a.m., Beardsley's note saying 5:20 or 5:30 a.m., and the delay in Beardsley recording the time on the proper document, would have to conclude that Kircher may or may not have called in late and not discipline Kircher. I am convinced that Kircher called in at 5 a.m. based on her testimony and her demeanor. She was an honest woman and I don't believe mistaken.

On April 20, 1987, Kircher was given a written warning for damaging facility property. Resident was changing rooms and Kircher moved the resident's night stand or dresser. Kircher slid the nightstand across the floor leaving marks on the floor. She was given the written discipline because she damaged the floor and should have had the good sense to get assistance in lifting the nightstand so the floor would not be marked by sliding the nightstand.

It was uncontradicted that the marks left on the floor by Kircher moving the nightstand as she did were buffed right out by the custodial staff. The damage, in other words, was de minimus and temporary. Administrator Cimbalnik authorized DON Drake to give the written warning.

In light of the fact hat the damage was not permanent and not severe it is inconceivable that Kircher would have been so disciplined but for her prounion activity of which Cimbalnik and Drake were well aware. *Wright Line*, supra.

Both disciplines were violative of Section 8(a)(1) and (3) of the Act.

D. *Failure and Refusal to Engage in Effects Bargaining*

Negotiations for a first collective-bargaining agreement were continuing at the time Beverly sold these two facilities to Meritcare, Inc.

Judy Mollinger was Beverly's chief negotiator for both North Park and Greeve. As of Friday, September 11, 1987, negotiations were pending as regards North Park but Tuesday and Wednesday, September 15 and 16, 1987, negotiations were scheduled for Greene. The Union, of course, was the same for both the unit at North Park and the unit at Greene. The union negotiator was also the same, i.e., Mary Ann Collins.

On Friday, September 11, 1987, Judy Mollinger called Mary Ann Collins' office and left a message with Linda Wambaugh in Collins' absence. Mollinger told Wambaugh that North Park and Greene had been sold to Meritcare effective Tuesday, September 15, 1987, and Beverly was out of the picture.

Collins got the message later that day and notified Union President Rosemary Trump. Collins then called Mollinger's office to confirm that they would still be meeting on September 15 and 16. Mollinger was not in at this time.

On Monday, September 14, 1987, Mollinger called Collins' office. Collins was not in and Mollinger left a message that the meetings for September 15 and 16 were canceled and that the Union would have to deal with the new owners.

On Monday, September 14, 1987, Union President Trump called Mollinger's office. Judy Mollinger was not available. After being informed that there was no one there in Mollinger's office in Rockville, Maryland, or her boss' office in Virginia Beach, Virginia, for Trump to speak to, Trump left a message that the Union wanted to go ahead with the scheduled meetings on September 15 and 16 to engage in effects bargaining regarding both the North Park and Greene facilities.

Collins went to the scheduled meeting place on September 15 but neither Mollinger nor anyone else from Beverly showed up. Collins then went to the Greene Health Care Center and spoke to Administrator Pete Bender and told him that the Union wanted to engage in effects bargaining.

In point of fact the sale of these two facilities was not finalized until December 1987 but as of September 15, 1987, Meritcare, Inc., took over control and management of the facilities. Respondent was, of course, required to engage in effects bargaining, e.g., severance pay, insurance, accrued leave, recognition of the Union by the new owner, etc. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

By informing the Union on September 11 and 14, 1987, that the facilities were sold, that the Union would have to deal with the new owners, and canceling the scheduled meetings for September 15 and 16, 1987, Respondent violated Section 8(a)(1) and (5) of the Act.

On September 30, 1987, Collins finally managed to talk to Judy Mollinger. Mollinger told Collins to put it in writing what effects bargaining she wanted to engage in with respect to the sale of North Park and Greene. On October 1, 1987, the very next day, Collins wrote a letter requesting that Respondent engage in effects bargaining in the areas of accumulated leave, health insurance, and seniority lists.

On November 10, 1987, Mollinger wrote to Collins and answered her questions but only with respect to North Park and furnished no information about Greene. This was the last the Union heard from Mollinger. It is clear that Respondent violated the Act by failing and refusing to engage in effects bargaining. It is interesting to note that Mollinger testified that her orders in September 1987 were to do no negotiating regarding either facility. She carried out those orders pretty effectively and in violation of Section 8(a)(5) of the Act.

XXII. FOUR CHAPLAINS CONVALESCENT CENTER, WESTLAND, MICHIGAN; TRIAL ON FEBRUARY 14, 15, 16, AND 17, AND JUNE 6, 1989; CHARGING PARTIES ARE SEIU 79 AND PRECIOUS BEASLEY, AN INDIVIDUAL

Trial on this case opened on February 14, 1989, and the testimony of four witnesses was taken, i.e., Jan Heller, Precious Beasley, Deborah Wise, and Angela Davis. On February 15, 1989, the court reporter advised that her tapes of the session were stolen from her in a robbery. They were never recovered. Pursuant to agreement of the parties trial reconvened on June 6, 1989, to retake the testimony of the four witnesses. Only Precious Beasley was available. In addition, the testimony of Ava Anderson was taken as well. Anderson was scheduled to testify in February but was hospitalized due to complications arising from her pregnancy. She later gave birth to a healthy baby and testified along with Beasley in June. I am not relying on the testimony adduced on February 14, 1989.

The Union tried to organize this facility. An election was held on March 18, 1988. The result was 35 votes for the Union and 38 votes against the Union. The Union filed objections and the Regional Director for Region 7 issued an order directing a hearing on objections. The General Counsel moved to consolidate the hearing on objections with the unfair labor practice case which motion I granted on October 3, 1988. The objections to the election are the same as the allegations of unfair labor practices. It is alleged that Respondent unlawfully disciplined four employees, Yvonne Williams, Precious Beasley, Leonnette Curry, and Pauline Raynor and that those unlawful disciplines violate the Act and should result in the election being set aside and a new election ordered.

A. *Written Warnings Given to Yvonne Williams*

Yvonne Williams was actively prounion. She signed a letter sent to Administrator Larry Ruhlen, which was hand-delivered to DON Dianne Pryslack, on February 2, 1988, demanding that the Union be recognized. The other three alleged discriminatees, Precious Beasley, Leonnette Curry, and Pauline Raynor and nine other employees signed as well. In addition, a handbill was distributed outside the facility urging unionization signed by Williams, the other three alleged discriminatees, and some other employees. Respondent knew Williams was prounion when it issued her a written warning on February 13, 1988, approximately 1 month before the election, for failing to punch in for work and punch out for lunchbreak.

Charge Nurse Pat Bailey in making rounds observed that one of Williams' patients was wet. She looked for Williams but couldn't locate her. She then checked and found out that Williams had not punched in for work on the timeclock, had not punched out for lunch, and had not signed out for lunch at her work station, all of which Williams should have done pursuant to facility practice and this requirement had been the subject of a recent in-service meeting on February 3, 1988, where employees, to include Williams, were reminded about the rule on punching in and out for work and breaks and lunch and signing in and out of work station.

Bailey gave Williams a written warning. Williams was guilty of the offense. Bailey also learned in checking up on Williams that aides Precious Beasley and Cindy Syracuse had also failed to punch out for lunch. All three women, Williams, Beasley and Syracuse were given written warnings. There is no evidence that Cindy Syracuse was in any way active on behalf of the Union. In light of these facts and in light of the fact that evidence reflected that a number of employees were similarly disciplined for the same offense I find that no violation of the Act occurred when Williams was issued the written warning even though there was credible evidence that not on every single occasion that an employee failed to punch in or out for lunch or break or failed to sign in or out of their work station were they disciplined. On August 10, 1988, Respondent fired Williams. A charge was filed over this discharge but was never before me for decision as to whether or not the discharge violated the Act.

B. *Discipline of Precious Beasley*

Precious Beasley, a nurses aide, was actively prounion and Respondent knew it when it issued her a written warning on February 13, 1988, an oral warning on February 20, 1988, suspended her indefinitely on February 25, 1988, and discharged her on May 17, 1988. Beasley, like the other three alleged discriminatees, signed the letter to Administrator Ruhlen demanding recognition of the Union and her name was on the handbill which urged unionization.

I also find that Beasley spoke with Administrator Ruhlen and DON Pryslack and they asked her to keep them informed about union activity. I also find that DON Pryslack spoke with Beasley and told Beasley she was being ''commissioned'' to promote the company position about unionization and she should keep Pryslack posted on developments. Beasley impressed me as an honest person although not particularly intelligent. Neither Ruhlen nor Pryslack testified. They are no longer with Respondent and balked at cooperation with Respondent's lawyers.

With respect to Beasley's written warning of February 13, 1988, I refer to the section immediately above this one which concerned a similar discipline of Yvonne Williams which I found to be lawful. For the same reasons I find Beasley's written warning for failing to punch out for lunch to be lawful. Beasley knew she violated the rule and she, Williams, and Cindy Syracuse were all similarly disciplined and Syracuse was never shown to be actively prounion. Just 10 days prior Beasley and the others had been specifically readvised of the rule on punching in and punching out.

On February 20, 1988, Beasley received an oral warning for failing to record the ''output'' of three patients under her care. Each nurse aide is supposed to record what the ''output'' or contents are of their patients who are catheterized and wearing so-called Foley bags. ''Output'' is the quantity of urine deposited in the Foley bag. If blood is detected in the urine that is also to be recorded. The nurses aides are regularly reminded that they are to record output. You don't have to be a genius to recognize that this recording of output is very important. Beasley knew she was supposed to do it and admits that she did not do so. While there was evidence that some employees failed to record output and were not disciplined there was also evidence that some employees had been disciplined for failing to record output. I do not find that Beasley's oral warning for failing to record output violated the Act in any way.

However, I do find that Beasley's indefinite suspension and discharge were unlawful and in violation of the Act.

On the day that Beasley received the oral warning for failure to record output she was advised by fellow nurses aides Angela Davis and Ava Anderson that they had observed charge nurse Pat Bailey, who had given Beasley the written warning of February 13 and the oral warning of February 20, removing some of her own clothes from a patient's closet. The three aides decided to write up Pat Bailey for keeping personal clothes in a patient's closet which was a violation of the rules at this facility. Beasley got the form from another charge nurse who told her and Ava Anderson that an aide could write up a charge nurse. Beasley filled in the form and Anderson and Davis signed it.

Within 5 days Beasley is suspended indefinitely and later fired. No discipline whatsoever is meted out against either Davis or Anderson.

Beasley was suspended on February 25 for ''alleged patient neglect and/or failure to perform duties and/or improper use of company disciplinary form.'' As noted above neither Davis nor Anderson were disciplined at all. The patient who was supposedly neglected is, believe it or not, the mother of charge nurse Pat Bailey.

When Beasley was suspended she was not told the identity of the patient who she had allegedly neglected. When Beasley, Anderson, and Davis concertedly brought to management's attention their belief that charge nurse Bailey had violated a facility rule they were engaged in protected concerted activity. They had an honest belief that Bailey violated the rule and an honest belief, albeit inaccurate, that they could ''write her up.'' Beasley is singled out for punishment because she was actively prounion.

I believe the charge of patient neglect was trumped up. It is interesting that the facility first learned of it from Bailey about whom Beasley had complained and it is, lo and behold, Bailey's very own mother who was allegedly neglected.

The investigation of the patient neglect did not include an interview of Beasley. Beasley was never told the allegations against her, who made them, or asked what, if anything, was her defense to the allegations of neglect.

Respondent did have LPN Mary Sirke take a statement from IA, the resident in question. Sirke first spoke with Pat Bailey, IA's mother and Sirke's colleague, and *then* Sirke spoke with IA. IA's complaints are that Beasley was sassy with her, took her newspaper one day and didn't return it, and wouldn't put her to bed. At the hearing Beasley admitted that one time IA asked Beasley to put her to bed, Beasley was busy with another resident and couldn't do it immediately and when she went to do so found out that a fellow aide had put IA to bed and Beasley admits she once borrowed a magazine from IA and failed to return it. She didn't do anything else that could conceivably be termed patient neglect. IA did not testify.

On May 17, 1988, Beasley was discharged for the same reasons she was suspended. I find that Beasley's indefinite suspension and discharge were motivated by Beasley's protected concerted activity of ''writing up'' Pat Bailey and because of Beasley's prounion activity. In connection with Beasley's prounion activity I note that at a meeting with a group of employees during the campaign Mike Plott, one of

Respondent's industrial relations representatives, was speaking out against the Union. Beasley made a point of telling Plott that she, in effect, was sick and tired of Respondent talking badly about the Union and she got up to leave. Considering that Respondent took no disciplinary action against Anderson and Davis, considering that the neglect of regiment IA was nonexistent or miniscule, considering that resident IA was the mother of charge nurse Pat Bailey, considering that investigation of the patient neglect did not extend to asking the accused her side of it, and considering the fact that Beasley was actively prounion and Respondent knew it. I conclude that Respondent suspended and discharged Beasley in violation of Section 8(a)(3) of the Act and she should be reinstated with backpay. *Wright Line*, supra.

C. *The 3-Day Suspension of Leonnette Curry*

Leonnette Curry was also actively prounion and Respondent knew it. She signed the letter to Administrator Ruhlen demanding that the Union be recognized and her signature was also on the handbill distributed in February 1988.

Less than 1 month before the election Curry was suspended for 3 days for sleeping on the job.

Curry worked 11 p.m. to 7 a.m. shift and during that shift she was the only aide in the senior resident care section or SRC. The aide on midnights on SRC are on call throughout their shift and therefore paid for their 30-minute lunchbreak. Whereas the other aides were not paid for their lunchbreak. Although there was some dispute about where the SRC aide on midnights could take her breaks suffice it and say it was unclear.

Curry would join the aides for the lunchbreak in the employee lounge. A number of aides, to include Curry, would put their heads on the table and tell their fellow employees, who were not going to nap, to wake them up when the lunchbreak was over.

Curry was observed sleeping during a lunchbreak by another aide who anonymously reported it. When confronted about sleeping on duty Curry admitted it and was suspended for 3 days.

I find that Curry was suspended because of her prounion activity. Curry, whether asleep or awake, was equally capable of being called on to assist a resident in her capacity as a SRC aide. Curry could not be everywhere, therefore, when on lunchbreak someone would have to find her. She was available in the employee break area. She was never asleep off by herself and she did not sleep in her car or leave the facility. There is no evidence that prior to her suspension that anyone told Curry that she could not nap during her lunchbreak.

To suspend this prounion employee 1 month before the election for doing something it was not that obvious she wasn't allowed to do was a violation of Section 8(a)(3) of the Act.

Respondent could demand that SRC aides on midnight not nap as other aides did during their lunchbreak but Respondent never made that clear to Curry. Henceforth Curry knows the rules. Don't nap period even if other aides are there to wake you up after the lunchbreak.

There is no evidence whatsoever that any resident was denied care or jeopardized in any way by Curry napping in the employee lounge during her lunchbreak where other aides were present and instructed to wake her up when her break ended and anyone looking for her could easily find her and wake her.

D. *Oral Warning to Pauline Raynor*

Pauline Raynor, like the other three alleged discriminatees, was actively prounion and Respondent knew it.

On February 27, 1988, she received an oral warning from her supervisor, Chris Biernacki. Biernacki credibly testified that he gave the oral warning for excessive tardiness because Raynor was excessively tardy and not, in whole or in part, because of her union activity. I believe him. He was a credible witness.

Raynor was excessively tardy. Her excuse was that she had car troubles. Her excuse may be the reason for her tardiness but it is not an excuse. An excuse would be something along the lines of a sick child or something of that nature.

The oral warning given on February 27, 1988, was for being 8 minutes late on February 18, 1988, 20 minutes late on February 19, 1988, 1 hour and 11 minutes late on February 26, 1988, and 52 minutes late on February 27, 1988.

Raynor claims she had permission to be late. She told DON Diane Pryslack and Supervisor Chris Biernacki that she had car problems. The fact that Pryslack may have told Raynor to do the best she could to get to work and call in if she was going to be late is not a blank check excusing all future tardiness due to her car problems.

Since Raynor was indeed excessively tardy and since I credit Biernacki as to why he disciplined Raynor I do not find Raynor's discipline to be violative of Section 8(a)(3) of the Act.

E. *Setting aside of First Election*

Since I find that within approximately 1 month of the election, which the Union lost, 38 votes to 35, that Respondent violated Section 8(a)(3) by suspending indefinitely Precious Beasley and suspending for 3 days Leonnette Curry, both of whom were members of the union organizing team and strong union supporters, I will recommend that the election results be set aside and a new election ordered. Beasley was discharged subsequent to the election and that illegal discharge, therefore, could not have interfered with the election results.

XXIII. ADRIAN HEALTH CARE CENTER, ADRIAN, MICHIGAN; TRIAL ON MARCH 15 AND 16, 1989; CHARGING PARTY IS SEIU 79

The union organizing campaign began in late September 1986. An election petition was filed November 5, 1986, and an election held on December 19, 1986, which the Union won.

On January 14, 1987, Kim King was discharged. The only issue in this case is whether or not Kim King was discharged because of her prounion activity or not. It is my conclusion that she was fired because of her prounion activity and, therefore, Respondent violated Section 8(a)(3) of the Act.

Administrator Kevin McKim and Housekeeping Supervisor Gloria Koon were the persons who signed off on King's discharge notice. McKim claims he didn't know anything about King's union sympathies and Koon claims that she thought that King was antiunion. I do not believe either McKim or Koon on this point.

King was actively prounion and Respondent knew it. Union Organizer Cecilia Aitchison referred to King as one of the three principal prounion forces at the facility. King bandbilled at the facility on November 4 and December 17, 1986 (the day after Kevin McKim became the new administrator). The prounion handbill passed out on November 5, 1986, had King's signature on it along with the signatures of 12 other employees. She attended bargaining sessions in December 1986 between the Union and other Beverly facilities. A prounion letter to then Administrator Linda Minnema in November 1986 advising her of the union campaign contained the signatures of King and seven other employees. These were documents that Respondent would keep. It is inconceivable that Administrator McKim or Housekeeping Supervisor Koon knew nothing of King's union activity.

Kim King's performance ratings were ''very good'' but she had been disciplined prior to the beginning of the organizing campaign in late September 1986 and prior to Respondent being aware of her prounion posture on November 5, 1986.

King's prior disciplines were as follows: March 26, 1986, written warning for improper use of the facility phone; September 4, 1986, written warning for violation of the dress code by wearing a headband; September 11, 1986, written warning again for violation of the dress code by wearing a headband; October 14, 1986, written warning for leaving her department without permission, and November 4, 1986, oral warning for failure to keep timecard accurately.

If King committed another violation of the rules for which she could be given a written warning she could, because of her record and because of Respondent's progressive disciplinary system, be discharged.

On January 14, 1987, King was discharged for alleged misconduct on January 13, 1987, when she allegedly left the facility without permission. It is clear to me that this discharge was in violation of Section 8(a)(3) of the Act.

On January 12, 1987, King and several other employees were elected stewards. The list of newly elected stewards was posted in the breakroom, which was frequented by Respondent's management. King saw the work schedule and observed that employee Michael Osborne was not listed as working. She called Osborne and informed him of this fact. Osborne came to the facility. He spoke with Administrator McKim and DON Kristen Warner. He was told he was being suspended pending investigation for patient abuse. He was informed that he could not be told the name of the patient he allegedly abused. Osborne was quite upset. He said ''I quit.''

After he left the administrator's office Osborne went to see Kim King, newly elected steward in the laundry department where she was a second-shift laundry aide. Osborne spoke with King in the presence of nurses aide and also newly elected steward Angela Russell. DON Warner came into the laundry room, saw Osborne, and told him to leave the building. He did so. As he was leaving King asked Osborne to wait for her in the parking lot.

King's supervisor Gloria Koon was not available because she was tied up with a quality assurance person from Beverly's higher headquarters. Pursuant to past practice King asked Russell to ask charge nurse Marge Hanning if King could take her break early. Russell asked Hanning. Hanning said okay if nothing needed to be done at that time. Russell told King and King took her break scheduled for 5 p.m. at 4 p.m. She went to the parking lot and spoke briefly with Osborne about what happened in his meeting with the administrator and DON and what, if anything, the Union could do for him and then she went back to work. There is no evidence that she took any longer than her normal breaktime and no evidence that the operations of the facility were adversely affected in any way.

King was observed talking outside the facility with Osborne and it was reported to management who fired her the very next day.

It is clear that King had permission from Hanning, an acknowledged supervisor and agent, to take her break early. The rule at the facility, i.e., page 10 of the handbook, provides that an employee must have permission in order to leave ''the facility premises during the working hours.'' Does premises include the parking lot? Is breaktime included in working hours? We need not even get into this because back in December 1986 Marge Kolb told employees that they could leave the building during breaktime but should not leave the facility property while on break. A comon practice was for employees to step outside for a cigarette while on break, run to their car to get something during break, or, in good weather to sit at the outside picnic table while on break. Kolb is an industrial relations representative, an RN and served as de facto interim administrator at this facility in December 1986.

Since King was allowed to step outside of the building on her break and had permission to take her break early she should not have been fired for doing so. King was fired because this very prounion employee and newly elected steward was conferring with a former employee. King was discharged in violation of Section 8(a)(3) of the Act.

I found all the General Counsel's witnesses to be very credible including Michael Osborne, who now lives with Kim King. Osborne, who as noted above quit Respondent's employ when told he was under investigation for patient abuse, is now a corrections officer with the Michigan State Department of Corrections.

XXIV. PROVINCIAL HOUSE TOTAL LIVING CENTER, KALAMAZOO, MICHIGAN; TRIAL ON MARCH 13 AND 14, 1989; CHARGING PARTY IS OPERATING ENGINEERS 547

The Union lost an election at this facility on August 22, 1986. It is alleged that during the campaign preceding the election an illegal promise was made in violation of Section 8(a)(1) of the Act and that after the election an active union supporter, Linda Johnson, was discharged in violation of Section 8(a)(3) of the Act and another employee, Kathree Johnson (no relation to Linda Johnson) was told she was denied her preferred work schedule in violation of Section 8(a)(1) of the Act.

A. *Alleged Illegal Promise by Industrial Relations Representative Marge Kolb*

Industrial Relations Representative Marge Kolb was part of the management team working to defeat the Union during the campaign. It is alleged that in August 1986, a few weeks before the election, Kolb told employee Linda Johnson that Respondent was working on a plan to give employees every other weekend off, which was more weekends off than they

were then getting off, but that this plan would be rejected if the Union won the upcoming election.

Kolb impressed me as honest and smart. She denies she said this and I believe her. She denies even having a ''one on one'' conversation ever with Linda Johnson and while she may be mistaken about that I do believe her when she testifies that she never said what was attributed to her.

Kolb states that during the campaign she did mention scheduling and basically said that in contracts with unions that Respondent has entered into and she had the contracts with her that Respondent in the management-rights clause of the contracts retained the right to schedule the employees. There was no violation of the Act.

B. *Discharge of Linda Johnson*

Linda Johnson was fired in December 1986 some 4 months after the election. She was actively prounion and Respondent knew it. She was a member of the employee organizing committee along with 14 other employees and a letter to ''fellow employees'' signed by Johnson and the other members of the union organizing committee was found in Respondent's files and produced pursuant to subpoena. Johnson encouraged her fellow employees to join the Union. In short, Johnson was prounion and Respondent knew it.

In fact, Linda Johnson's husband, Michael Johnson, who worked at another Beverly facility, was told by the administrator at that facility, Christopher Woitzel, that Woitzel had received a call from the administrator of the facility where Linda Johnson worked saying that Linda Johnson was trying to get a union in and he was warned that her husband might try to bring in a union at the facility where he worked. Woitzel then told Michael Johnson that he was a good worker and he wouldn't want to lose him. Woitzel, who is no longer with Beverly, did not testify. I found Linda Johnson and her husband, Michael Johnson, to be credible witnesses.

Linda Johnson's record for discipline was bad. Between May 1985 and June 1986 she received six written warnings and one oral warning. Her work offenses included excessive absenteeism, excessive tardiness, loitering, failing to be at work on time, and disrespect to superiors.

In November 1986 she received a written warning for failure to shave three patients. The supervisor who gave Linda Johnson the written warning was Anne Williams. Linda Johnson is black and Anne Williams is white. Back in February 1986 Johnson and several other employees concertedly complained in writing that Anne Williams was harassing some employees because they were black.

When she was afforded an opportunity to tell her side in connection with the written warning for failure to shave the patients in November 1986 Linda Johnson wrote on the form that Williams was picking on her because she was black and because of the Union. She also said that nurse technician Pauline Bailey had told her (Johnson) that Williams told Bailey to check up on only Johnson's work and let Williams know of any deficiencies. Bailey and Williams both denied that Bailey was ever told just to check up on Johnson's work. Linda Johnson was fired for the offense of ''making false or malicious statement about an employee, the Company, or a patient.'' Specifically for attributing to Bailey something Bailey now claims she never said.

Between January 1985 and the hearing in March 1989 four employees, in addition to Linda Johnson, were disciplined for violating this rule. Three of them received written warnings and only one was discharged. The employee discharged had told a patient that the food at the facility was ''swill,'' ''slop,'' and ''poison'' and sarcastically expressed to the patient that the patient was ''finally done'' when a patient finished a meal. This is significantly more serious than what Johnson wrote about Bailey.

This facility, unlike the others in this litigation which cater to elderly residents, caters to severely physically and mentally handicapped persons of all ages. To tell a severely handicapped patient that their food is ''swill,'' ''slop,'' or worse yet ''poison'' is quite a bit different from an employee claiming that another employee says she was told to check on her work only. Indeed, in Bailey's and Williams' statements given to Respondent prior to Johnson's discharge in which they state that Bailey was told by Williams to check just the one wing where Johnson worked (and some other employees) would reflect some basis in fact for Johnson mistakenly, but in good faith, claiming that Bailey told her what she claims she was told. In other words, Bailey was told just to check the wing where Johnson worked rather than being told just to check on Johnson.

The discharge of Linda Johnson was violative of Section 8(a)(3) of the Act when one considers (1) that Respondent ''leaped'' to the conclusion that Johnson lied when it appeared more believable that Johnson either told the truth or was reasonably mistaken about Bailey's statement to her, (2) that Johnson was prounion, a member of the union organizing committee, and had spoken up in favor of the Union at a mandatory meeting run by management during the campaign, (3) that Administrator Woitzel told Johnson's husband that the administrator where Johnson worked told Woitzel to keep an eye on Johnson's husband because she had tried to bring union into the facility where she worked and her husband might do the same where he worked, and (4) that the only employee discharged for the same offense as Linda Johnson committed a much more serious violation and that two of the other three employees, who only received written warnings, also committed significantly more serious offenses than Johnson, i.e., they reported that seriously handicapped patients had eaten when in fact they had not eaten.

C. *Threat by Administrator Sonja Scarf*

Kathree Johnson, no relation to Linda Johnson, was prounion. She served as the union observer at the election which the Union lost. She is no longer with Respondent.

Kathree Johnson worked day shift. She was permitted to start work at 7 a.m. rather than 6:30 a.m. because of babysitter problems.

In December 1986, after the Union lost the election, the day shift hours were changed from 6:30 a.m. to 2:30 p.m. to 6 a.m. to 2 p.m. Kathree Johnson worked 7 a.m. to 3 p.m. She asked Administrator Sonja Scarf in January 1987 at a staff meeting on the schedule change if she (Rathree Johnson) could continue to work 7 a.m. to 3 p.m., because of her continuing babysitter situation. Scarf, after telling Kathree Johnson that she remembered Johnson saying during the campaign that a union was needed, told Johnson to put in a formal request. Johnson did and it was denied.

Scarf claims she told Johnson at the meeting in January 1987 that a few months ago she (Scarf) couldn't do anything

right and now Johnson wanted a favor. Scarf was referring to Johnson's prounion posture during the campaign.

Scarf's statement to Kathree Johnson was a threat that because of Johnson's prounion posture during the campaign she would not get her preferred schedule and was a violation of Section 8(a)(1) of the Act.

XXV. FAITH HAVEN CARE CENTER, JACKSON, MICHIGAN; TRIAL ON MARCH 20, 21, AND 22, 1989; CHARGING PARTY IS SEIU 79

It is alleged that during the union organizing campaign which ran from March 4 to April 17, 1987, that Respondent violated Section 8(a)(1) of the Act by threatening more stringent work rules if the Union won the election, unlawfully interrogating employees, soliciting employees to engage in surveillance of union activity, threatening loss of benefits if the Union won the election, removing bulletin board to interfere with union campaign, and that Respondent violated Section 8(a)(3) of the Act by unlawfully discharging prounion employees Angela Poole and Yvonne Murine. The Union won the election anyway.

A. *Alleged 8(a)(1) Violations by DON Cindi Ormsby*

At a mandatory meeting on February 18, 1987, DON Cindi Ormsby in talking about the Union threatened the employees by telling them if they select the Union Respondent would go by the book and things can get hectic. This is a threat in violation of Section 8(a)(1) of the Act. Yvonne Murine credibly testified to this statement by Ormsby. I do not credit Ormsby's denial.

B. *Alleged 8(a)(1) Violations by Administrator Susan Brown*

Susan Brown is the administrator at this facility and the daughter of Cindi Ormsby, the director of nursing.

On April 3, 1987, employee Carmen Yaloushian, who was very credible, had a conversation with Administrator Susan Brown. In the course of that conversation, which was friendly, Brown asked Yaloushian if it would help for Yaloushian to speak to the other employees and try to stop the union effort. Yaloushian said it was too late to do that. Brown also told Yaloushian that if the Union got in that the employees would lose the 20-cent-per-hour bonus for perfect attendance. Although it was a friendly conversation there is no evidence that Brown, the highest official in the facility, and Yaloushian, had any relationship outside of work. *Rossmore House*, supra.

Brown violated Section 8(a)(1) of the Act by unlawfully interrogating employee Yaloushian, by threatening her with loss of benefits if the Union was selected, and by asking her to engage in surveillance of the union activities of employees as an agent of Respondent.

At a mandatory meeting on April 15, 1987, just 2 days before the election, Administrator Brown spoke to employees. Brown said that if the Union got in the employees would lose the 20-cent-per-hour bonus program for perfect attendance. I credit the testimony of employees Carmen Yaloushian, Donna Wilson, and Phillip Burns, all of whom testified that Brown said this over the testimony of Respondent's witness that this was not said. This constitutes a threat in violation of Section 8(a)(1) of the Act. The General Counsel's witnesses impressed me by their demeanor and otherwise as honest people.

C. *Removal of Bulletin Board*

Bulletin boards were located in both breakrooms at the facility. There was no evidence that residents of the facility used either breakroom.

The bulletin board in one of the breakrooms was used during the union organizing campaign by the employees to post union literature as well as other notices of interest to the employees that had nothing to do with the Union.

Approximately 1 month before the election Administrator Susan Brown ordered the bulletin board removed. Evidently she thought some comments on it were derogatory of management.

Maybe some statements written on the bulletin board such as ''Administrator Stinks'' were inappropriate but Brown went too far in removing the bulletin board without first cautioning employees not to write derogatory comments on it, etc. The removal of the bulletin board used by employees to convey information regarding the upcoming election tended to interfere with employees in the exercise of their rights and was a violation of Section 8(a)(1) of the Act.

D. *Alleged 8(a)(1) Violations by Maintenance Supervisor Jack Daane*

On February 25, 1987, Carmen Yaloushian, an extremely credible witness, spoke with Maintenance Supervisor Jack Daane. Although Daane was trying to be nice to the very emotional Yaloushian in telling her that if any employee harasses her about the Union management would come to her aid he went too far when he threatened her by stating that if the Union got in Respondent would go strictly by the book. This is a threat in violation of Section 8(a)(1) of the Act. He also unlawfully interrogated Yaloushian in violation of Section 8(a)(1) of the Act when he asked her, in this same conversation, which employees were trying to get the Union into the facility.

On March 9, 1987, Daane gave a written warning to employee Phillip Burns and when Burns asked, in effect, why management was cracking down Daane told Burns that because of the Union that Respondent was going by the book. This a threat in violation of Section 8(a)(1) of the Act.

E. *Alleged 8(a)(1) Violations by Charge Nurses Judy Falor and Ula Lauterback*

Sue Atkins, who is still employed at the facility, heard charge nurse Judy Falor, who also still works at the facility, say that she had been told to write up employees. Falor never testified.

Angela Poole and Sue Atkins also heard charge nurse Ula Lauterback say that the charge nurses were instructed to write people up for every little thing.

Both incidents happened in March 1987 and the statements of Falor and Lauterback constituted threats in violation of Section 8(a)(1) of the Act, i.e., that because of the Union there would be more stringent enforcement of work rules.

F. *Discharge of Angela Scott*

Nurses aide Angela Scott was fired on March 26, 1987. I do not find her discharge to be in violation of Section

8(a)(3) of the Act because there is very limited evidence that Scott engaged in prounion activity and no evidence that Respondent believed she had when it discharged her. Scott did handbill on behalf of the Union in front of Respondent's facility but this was after she was fired. Scott testified she helped another aide solicit employees to sign union authorization cards but no evidence that Respondent knew of this.

Scott and another aide, Maria Shirley, agreed that Scott would work Shirley's 7 a.m. to 3 p.m. shift on Monday, March 23, 1987. Shirley told Medical Records Coordinator Jill Calor that Scott would work for her. Calor later asked Scott if she was going to work for Shirley on Monday. Scott said yes. On Monday, March 23, 1987, Scott didn't come in. Calor called her at home and said you're supposed to be at work and Scott said ''oh, shit.'' Scott forgot that she was working for Shirley. Scott was written up. In the absence of evidence that Respondent knew or believed Scott was prounion this writeup, I find, was not violative of Section 8(a)(3) of the Act.

The very next day Scott again failed to come to work. She was called at home and said that she had had an epileptic seizure that morning, as well as the day before March 23, was taking medication, and had fallen back to sleep before she got a chance to call the facility and say she couldn't get in to work. She received a second written warning, which, under Respondent's rules authorized Respondent to discharge her. Scott was fired. Since there is virtually no evidence of union activity by Scott and no evidence that Respondent thought she was prounion it is my conclusion that her discharge was not in violation of the Act. Scott's prior record for absenteeism I note, was bad. She began work on June 18, 1986, and was absent 12 times between July 6 and October 18, 1986.

Angela Scott has since married and is now called Angela Poole. At the hearing she was pregnant. She is an epileptic. Respondent is free, of course, to rehire her if they wish but her discharge was not in violation of the Act.

G. *Discharge of Yvonne Murine*

On March 27, 1987, Yvonne Murine was discharged. I find that her discharge, unlike Angela Scott's, was violative of Section 8(a)(3) of the Act.

Murine began her employment with Respondent on February 14, 1985. She was never disciplined until *after* she became active on behalf of the Union more than 2 years later. Her signature and that of 19 other employees was placed on a handbill to fellow employees urging unionization. A copy of this same handbill was given to Administrator Brown prior to Murine's difficulties at the facility.

Murine visited employees at home on behalf of the Union, she got union authorization cards signed, posted union literature on the bulletin board at the facility, and she handbilled three times before her discharge in front of the facility. Indeed, Maintenance Supervisor Jack Daane even took pictures of the handbillers.

On March 7, 1987, Murine was given a written warning for a no-call–no-show. Murine didn't come to work. Murine credibly testified she tried to call the charge nurse to say she was ill but couldn't get anyone. She finally called her sister, Michelle Parsons, at the facility where she also worked to say that she was ill, would not be in to work, and to pass this on to management. Parsons never passed the word on to the charge nurse. Respondent didn't even ask Parsons if Murine had called her or not. Respondent simply gave Murine the warning. Murine wrote a note to Administrator Brown and DON Ormsby and put it under Brown's door claiming that she was disciplined for her union activity. She was right. Brown claims she never got the note. I don't believe her.

On March 25, 1987, Murine was written up for failing to take resident BC to the bathroom. Aides were allowed to ask other aides to help them. Murine credibly testified that the staff was working ''short'' that day and she asked fellow aides Maria Shirley and Kim Walters to take BC to the bathroom because she (Murine) was busy doing something else. They said they would. It was permissible for Murine to make this arrangement. Walters corroborates Murine and admits that it was *she* who forgot to take BC to the bathroom and not Murine. Murine was disciplined for failing to do what someone else was supposed to do. Respondent learned that this was the situation but did not withdraw the discipline.

On March 22, 1987, Murine was written up for using the facility phone without permission. She was calling home to check on her daughter who was ill. Murine was guilty of this offense but evidence at the hearing reflects that only one other employee was ever disciplined for violating this rule and this employee was simultaneously disciplined for several other rule infractions. It seems clear that Respondent was out to get Murine.

On March 27, 1987, Murine was discharged for failing to call in at least 2 hours before the start of her shift to report she was ill and could not come to work. She did violate the rule but the circumstances were somewhat unique. Murine woke up at 5:30 a.m., with a sore throat. When her throat wasn't any better by 5:55 a.m., she called in sick. Jill Calor, who took the call, told her that she shouldn't be around elderly residents with a sore throat.

In addition there was evidence at the hearing that Jack Withrow was not always disciplined when he violated the 2-hour call-in rule nor was Darlene Risner or Kim Walters. Some were written up and some were not.

It is clear considering all the evidence that Murine was fired in violation of Section 8(a)(3) of the Act. *Wright Line*, supra.

XXVI. SHERMAN OAKS CARE CENTER, MUSKEGON, MICHIGAN; TRIAL ON MARCH 23, 1989; CHARGING PARTY IS SEIU 79

Since September 1984 the Union has represented a unit of service and maintenance employees at this facility.

There were collective-bargaining agreements in effect from April 1, 1985, to March 31, 1987, and from June 4, 1987, to June 1, 1990. Each agreement contained a grievance-arbitration clause. Further, both agreements contain the following identical language:

> The Employer will implement, post, inservice and enforce a program regarding the control of infectious/communicable diseases, which will include notifying employees regarding the existence of any such disease known by the Employer to exist in the facility, providing appropriate protective equipment and clothing, contamination-preventive procedures, and disposal methods/procedures to contaminated materials.

On June 18 and 25, 1987, grievances were filed by the Union which basically said that the Union understood that two residents in the facility were tested for AIDS and the employees should be notified of the results so that they could protect themselves from the disease if the patients had tested positive. The grievances were denied at steps 1 and 2. The Union was informed that the results of any AIDS testing would not be turned over to them. The grievances were referred to a level higher than the facility.

On June 30, 1987, the Union requested, in writing, that Respondent supply it in connection with the appeal of the grievances a copy of Respondent's infectious/communicable disease program. Respondent by letter dated July 15, 1987, refused to turn over this information.

Subsequently, the Union and Respondent met on August 27, October 14 and 28, and December 10, 1987. The Union persisted in its request but the information was not turned over.

Respondent did have a written document entitled ''Infection Control Manual.'' It did not turn this document over until June 2, 1988, and only after the Union in December 1987 had filed a separate grievance over the failure to turn over the information requested.

It is obvious beyond all doubt that it was reasonable and necessary for the Union to have a copy of the ''Infection Control Manual'' in order to intelligently pursue the grievance. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Montgomery Ward & Co*., supra. The Union agreed when it received the ''Information Control Manual'' to show it only to an expert to see if indeed the employees it represented would be safe and to show the Manual to some employees to make sure that the provisions of the ''Infection Control Manual'' were being followed.

The delay of close to 1 year in turning over the manual which under the collective-bargaining agreement was to be ''posted'' was outrageous. At the time the grievances were filed and up to today there is unfortunately no cure for AIDS. It is a deadly disease. Accordingly, it is and remains a matter of monumental concern to the employees and their representative.

Respondent's argument that copies of the manual were in the facility and could be inspected by the employees is not persuasive. The manual should have promptly been turned over to the Union. One would be hard pressed to think of information more necessary or more relevant to the Union's performance of its function to adequately represent the employees at this facility.

The unconscionable delay in turning over the Infection Control Manual from July 1987 to June 1988 violates Section 8(a)(5) of the Act.

XXVII. EAST VILLAGE NURSING HOME, LEXINGTON, MASSACHUSETTS; TRIAL ON APRIL 17, 18, AND 19, 1989; CHARGING PARTY IS DISTRICT 1199 NE AND ELAIS PIERRE, AN INDIVIDUAL

A. *Overview*

It is alleged that during a union organizing campaign at this facility that three employees were disciplined for engaging in protected concerted activity. Subsequent to the election, which the Union won, it is alleged that Respondent failed and refused to turn over information requested by the Union in connection with the discharge of two other employees.

B. *Protected Concerted Activity*

On Saturday, September 19, 1987, Elias Pierre and Nicole Pierre, who are husband and wife, Immacula Joseph, and Pierre Paul Louis, were scheduled to work the 7 a.m. to 3 p.m. shift as nurses aides on the West 2 wing at this facility. There were 41 residents on that wing. Ordinarily, six or seven aides rather than just four aides would be needed to cover the wing. The four aides discussed the short staffing and told the charge nurse, Lucy La Fontaine, that they wanted to know if they were going to have to work short again. Working short, i.e., without enough help, was a terrible problem at this facility and evidence from both the General Counsel and Respondent reflected that virtually everyone at the facility considered it to be a serious problem. Indeed, Director of Nursing (DON) Terry Spellmeyer quit over it. Sometimes employees who worked short received ''short pay'' and sometimes they did not. ''Short pay'' was when the aides who worked would split the pay of the aides who did not show up for work.

Supervisor Olga Lanza came to the floor at La Fontaine's request. The four aides complained concertedly about the short staffing and wanted more aides to be put on the wing. Lanza told them to either leave or go to work. This statement by Lanza is not a violation of Section 8(a)(1) because the bottom line is after a supervisor listens to the complaints of the workers he or she can tell the workers to either leave or get back to work. In point of fact, the four aides did go to work. At no time did they refuse to go to work. What they did do was simply concertedly complain about a condition of their work. No residents of the facility were in the immediate vicinity.

Supervisor Olga Lanza disciplined two of the aides, Elias Pierre and Immacula Joseph. Elias Pierre was written up for refusing to do his assignment but he did not refuse to do his assignment. Lanza believes he sat down at the nurses station during the conversation between Lanza and the four aides. Both Elias Pierre and his wife testified he didn't sit down but even if he did sit down *during* the conversation between the aides and Lanza this is not, by itself, a refusal to work. Immacula Joseph also received a written warning for refusing to do an assignment and insubordination. The insubordination was being loud. But only Lanza says that Joseph was loud. Joseph was not disrespectful to Lanza. It is clear that Elias Pierre and Immacula Joseph were disciplined because of their participation in the protected concerted activity of complaining about a working condition, i.e., working short staffed and the discipline of them was a violation of Section 8(a)(1) of the Act. Lanza did not discipline the other two, Nicole Pierre or Pierre Paul Louis, because, apparently, they were not active participants in the conversations between Lanza and the aides. Elias Pierre and Immacula Joseph did the talking.

On Sunday, September 20, 1987, Immacula Joseph received a second written warning for coming to work late. This is not alleged as a violation of the Act. Joseph, after receiving this second written warning, voluntarily quit Respondent's employ.

Elias and Nicole Pierre, are a hard-working couple. Their command of the English language is very weak. They had

volunteered to work a double shift on Saturday, September 19, 1987, i.e., 7 a.m. to 11 p.m. They impressed me as the kind of people who do not refuse work.

On Sunday, September 20, 1987, Elias Pierre, Nicole Pierre, Martin FoKog, and a fourth aide were assigned as aides on the West 2 wing. Again, they were short staffed and complained about it. DON Terry Spellmeyer came to the floor. They complained about being short staffed. According to Spellmeyer they refused to work. According to Elias Pierre, Nicole Pierre, and Martin Fokog they never refused to work. When Spellmeyer came on the floor they were waiting for breakfast to be ready to be served. When the trays arrived they served breakfast to the residents and did their other work.

On Monday, September 21, 1987, Elias Pierre was called into the front office. He was shown the written warnings for refusing an assignment on September 19, 1987, for threatening charge nurse Lucy La Fontaine on September 19, 1987, and refusing to do an assignment on September 20, 1987. As a matter of fact, Elias Pierre never refused an assignment on either September 19 or September 20 and he did not threaten La Fontaine. La Fontaine did not testify. There is no real evidence in the form of a written statement to the facility about any threat Elias Pierre may have made to La Fontaine. The warning states that Pierre told La Fontaine ''that if they reported this 'she would see that would happen.''' This by itself is no threat. Elias Pierre was then told he was fired and he could take his wife with him. He reasonably concluded that his wife was likewise fired. He left the front office and got his wife. He told her she was fired also. Nicole Pierre, Elias' wife, called DON Spellmeyer who confirmed that she was fired by saying ''that's right you're fired.'' Since Nicole Pierre was such a good worker and since the facility was in desperate need of help it appears that if it was a legitimate misunderstanding Respondent would have gone out of its way to let Nicole Pierre know that she was not fired.

Spellmeyer claims that Nicole Pierre voluntarily quit. I don't believe Spellmeyer's version of events. The decision to fire Elias Pierre was made by DON Terry Spellmeyer according to her own admission. It is my conclusion that she also made the decision to fire Elias Pierre's wife.

Elias Pierre and Nicole Pierre had good work records at this facility. Elias Pierre's three performance evaluation forms showed ratings of ''outstanding,'' ''satisfactory,'' and ''very good.'' Nicole Pierre's one performance evaluation vas ''very good.'' Immacula Joseph's one performance evaluation was ''outstanding.'' Martin Fokog also received a written warning for refusing to do an assignment on September 20, 1987. He credibly testified that neither he nor anyone else on September 20 refused an assignment or refused to work. After he received his writeup Fokog went to see a higher official in Respondent's chain of command, i.e., Jay Begley, who did not testify but who was in the hearing room as Respondent's representative during this part of the litigation. When Begley heard Fokog's version of the events of Sunday, September 20, 1987, he tore up the written warning given Fokog. Fokog is still employed at this facility.

It seems clear that Elias Pierre's three warnings and discharge, Nicole Pierre's discharge, and Immacula Joseph's warning were all unlawful and the warnings were given and the discharges executed because these three employees engaged in protected concerted activity in complaining about working short staffed. At no time did they engage in an unlawful strike or unlawful withholding of services. This discipline was violative of Section 8(a)(1) of the Act.

C. *Information Request*

The Union won the December 30, 1987 election and was certified as the collective-bargaining representative of a unit of service and maintenance employees on January 7, 1988.

Respondent filed objections to the election but in an untimely fashion according to the Regional Director for Region 1. Respondent appealed the Regional Director's finding that the objections were untimely filed. On February 3, 1988, the Board concurred in the Regional Director's decision that the objections were untimely and that the certification of the Union stood.

On January 22, 1988, the Union sent a letter to Respondent which stated, in pertinent part, as follows:

> We understand that Marie P. Louis and Carol Mardi have been fired by East Village Nursing Home.
>
> In accordance with our status as collective-bargaining representative, the Union hereby requests the following information:
>
> —The dates of the dismissals;
>
> —The reasons for the dismissals;
>
> —Any documentation concerning their dismissal or the reasons for their dismissal, including past warnings that may have contributed to termination.

On February 29, 1988, the Union again made the same information request.

On March 17, 1988, the parties entered into a collective-bargaining agreement which contains a grievance-arbitration clause. Even prior to agreement being reached on a collective-bargaining agreement Respondent has an obligation to meet on grievances. The information request set out above is a virtual text book example of precisely the kind of information necessary and relevant for a union in its performance of its function as the exclusive representative for the unit, i.e., the Union would need this information in order to determine what, if anything, they should do on behalf of the two discharged women.

Respondent's refusal and failure to turn over this information violates Section 8(a)(5) of the Act.

XXVIII. RIDGEWOOD COURT NURSING HOME, ATTLEBORO, MASSACHUSETTS; TRIAL ON APRIL 19, 1989; CHARGING PARTY IS DISTRICT 1199 NE

A successful union organizing campaign was mounted by the Union in August 1987. The Union won an election in October 1987 and was certified by the Board as collective-bargaining representative for a unit of service and maintenance employees on October 9, 1987. The parties reached agreement on a collective-bargaining agreement in March 1988.

The employee handbook contained the following rules:

> 2. SOLICITATION PROTECTION—In order to protect the employees from any form of solicitation, raffles, charity drives, direct sale items, or the like, etc. it is strictly prohibited for anyone to solicit employees or residents.

> 4. EMPLOYEE NO-ACCESS RULE—Employees are not permitted access to the interior of the facility or outside work areas during their off duty hours. Anyone awaiting transportation following their shift should do so in the employee break area.[2]

During the union organizing campaign Respondent posted the following rules in the facility:

> Solicitation by an employee of another employee is prohibited while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include an employee's own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean-up time. In addition, solicitation is prohibited at all time in immediate patient-care areas.
>
> Employees are not permitted access to the interior of the facility or outside work areas during their off-duty hours.

This notice was still posted at the time of the hearing in this case.

It is alleged that the Respondent, acting through DON Joseph Gelineau, violated Section 8(a)(1) of the Act on two occasions in incidents with employee Linda Barac and on one occasion in an incident with employee Alberta Paille. Gelineau is no longer in Respondent's employ. Although served with a subpoena by Respondent he refused to testify. Respondent did not seek enforcement of the subpoena but asks that no adverse inference be drawn from Gelineau not testifying. I draw no adverse inference from Gelineau's absence.

Linda Barac was actively prounion and Respondent knew it. Her name was on a mailgram sent in August 1987 to the administrator of this facility advising the administrator that she and 57 other employees wanted to be represented by the Union. Prior to the election Respondent prepared a written analysis of which employees they deemed prounion, against the Union or undecided. Barac was listed by Respondent as prounion. In addition, Barac was one of 11 employees on the union negotiating committee and Respondent was informed of this fact in writing on November 30, 1987.

Barac was a nurses aide. On December 16, 1987, she and several other employees met at the home of an employee. A matter of mutual concern to these employees was the behavior of Dietary Supervisor Madeline Estrella, who they felt was harassing the dietary aides under her by, among other things, telling them they would get off from work for a holiday and then changing her mind and telling them they had to work. Barac was not in Estrella's department. A contract had not as yet been entered into by the parties. It was agreed at this meeting that Barac and another employee would talk to Estrella and ask her not to harass the employees under her.

They met with Estrella on December 18, 1987. Both Barac and the other employee, Maria Coreas, had clocked out and were on their own time. They asked Estrella if she was aware of the Union and that she should stop harassing her employees. Barac did the talking. She did not raise her voice.

On December 23, 1987, DON Gelineau asked Barac to join him in the facility chapel where he ordered Barac not to harass the supervisors and told her further that he didn't give a ''fuck'' what she did outside the building but she was not to bring union messages into the building. He told her further after she told him she had clocked out and was on her own time that whenever she was in the building she was on *his* time. Gelineau was upset. Gelineau violated Section 8(a)(1) of the Act by telling Barac that whenever she was in the building she was on Respondent's time and that she was prohibited from bringing union messages into the building. I note that uncontradicted evidence at the hearing reflects that employees entered the building to pick up paychecks when not working, sold candy, girl scout cookies, ran errands for residents while off-duty, etc.

On December 31, 1987, Barac spoke again with Gelineau in his office. He was upset that Barac had spoken with an inspector doing a state survey of the facility and went on to ask Barac why did she join the Union, what did she expect to get from the Union and how many members were still left in the Union. This was unlawful interrogation in violation of Section 8(a)(1) of the Act.

On January 4, 1988, nurses aide Alberta Paille went to speak to DON Gelineau about what she perceived as an unfair written warning give to Linda Barac by DON Gelineau in late December 1987. The circumstances of Barac's written warning needn't be discussed since Respondent, pursuant to agreement with the Union, withdrew it from Barac's file. Gelineau was upset. He hollered at Paille, pointed his finger at her, and told her that as far as he was concerned the Union and she could go up in a puff of smoke. Paille was upset and cried, Gelineau apologized to her. Gelineau's statement that as far as he was concerned the Union could go up in a puff of smoke does not rise to the level of an implied threat of loss of the Union and was not a violation of the Act.

XXIX. TORRINGTON EXTEND-A-CARE NURSING HOME; TORRINGTON, CONNECTICUT; TRIAL ON APRIL 24 AND 25, 1989; CHARGING PARTY IS DISTRICT 1199 (FORMERLY TORRINGTON EXTEND-A-CARE EMPLOYEE ASSOCIATION)

A collective-bargaining agreement was entered into effective October 1, 1985, between the then owners of this facility and the Torrington Extend-A-Care Employee Association. Subsequent to agreement on this contract Beverly brought

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[2] This same language was in the handbook applicable to employees in Beverly's Heritage Division. The Heritage Division merged into the Eastern Division prior to this case being assigned to me in August 1988. The Eastern Division subsequently merged into one of Respondent's now 11 regions. As Respondent represented on December 13, 1989, the last day of hearings in this case, there is no longer any Heritage Division or Eastern Division in Beverly's corporate organization. These two subparagraphs of the Heritage Division Handbook were separately alleged as violations of Sec. 8(a)(1) of the Act on the theory that on their face they are illegal without reference to how the subparagraphs may have been enforced. I agree with respect to the first paragraph. It is a blanket prohibition on union solicitation and as such it is unlawful. *Republic Aviation Corp*., 324 U.S. 793, 803–804 fn. 10 (1945); *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956). Its inclusion in the handbook was a violation of Sec. 8(a)(1) of the Act.

The second paragraph is not unlawful on its face. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Absent disparate enforcement of this rule, i.e., permitting access except for union activity, or putting the rule into place solely to defeat a union organizing effort, there is no violation of the Act.

this facility and on September 29, 1987, formally accepted the contract as binding on it with some modifications.

It was agreed between Respondent and the Union that there would be a wage reopener beginning on April 1, 1988.

Pursuant to mutual agreement the wage reopener was postponed to June 3, 1988. On April 25, 1988, the Union sent Respondent a letter requesting raises for the employees it represented. Respondent did not respond to this request. On June 3, 1988, George Ulrich on behalf of Respondent said the union request for raises was too expensive. Ulrich went into a lengthy speech on the financial condition of Beverly Enterprises. He said Beverly was not going under but was having trouble staying afloat. He advised the Union that people were being laid off nationwide. Further, that vice presidents had been demoted. He gave the Union copies of several newspaper articles, which portrayed Beverly Enterprises as being in financial trouble, e.g., a report of a layoff of 100 people in the Virginia Beach, Virginia area alone, an article saying that Beverly cites ''large fund losses'' and that Beverly lost $33 million in 1987, a Wall Street Journal article which quoted Beverly as citing ''labor costs'' as a cause of its financial loss, an article that said Beverly proposed to sell off possibly as much as 18 percent of its nursing home operations to lighten its heavy debt burden, an article telling about a 1988 first half of the year loss for Beverly, Ulrich also gave the Union a copy of a Beverly Enterprises press release dated February 4, 1988, indicating a net loss for 1987 of over $30 million and a copy of a Beverly Enterprises press release, dated April 21, 1988, reflecting a 1988 first quarter net loss of $952,000. Ulrich went on to tell the Union that virtually all of Beverly's facilities were up for sale. He stated that in light of Respondent's financial condition he was proposing a wage freeze. Ulrich painted a terribly bleak picture although he never said that this particular facility lost money.

On June 9, 1988, the Union, in light of Ulrich's presentation on June 3, 1988, made a written request for certain information. The Union requested:

> (1) All documents filed with the Securities Exchange Commission from October 1985 until the present concerning Beverly Enterprises financial status;
>
> (2) Copies of monthly cash flow/income and balance sheet statements from October 1985 until the present;
>
> (3) Copies of monthly cash flow/income and balance sheet statements from October 1985 until the present for Torrington Extend-A-Care;
>
> (4) Copies of monthly cash flow/income and balance sheet statements from October 1985 until the present for the other eight Beverly Enterprises owned homes in Connecticut;
>
> (5) Copies of the amount TEAC spends monthly on ''pool nurses'' from October 1985 until the present, broken down by agency and hourly rate and fee.

With respect to item 5 Administrator Chris Smith had promised to turn this information over at the June 3, 1988 meeting. TEAC refers to Torrington Extend-A-Care.

Ulrich told the Union in a phone conversation on June 6, 1988, with Ruth Pulda, an attorney representing the Union, after she told him what the Union would be requesting that they were not entitled to the financial information they were requesting because Respondent was not claiming inability to pay. The Union conceded that Ulrich never specifically said that Respondent was unable to pay, i.e., the so-called magic words were not used, but the thrust of what Ulrich said on June 3, 1988, was clearly the functional equivalent of claiming inability to pay. Ulrich painted a picture of needing a wage freeze not to stay competitive but to stay afloat.

On June 17, 1988, the parties met again. The Union formally rejected the proposal of a wage freeze and persisted in its June 9, 1988 financial information request. I note that the Union represented a single unit of service and maintenance employees as well as registered nurses and LPNs. With respect to item 5, I note that ''pool nurses'' are nurses hired from outside agencies on an as-needed basis. Their pay is substantially higher than that of nurses who are regular employees of the facility. Needless to say if regular nurse employees got a raise and didn't quit the facility might not need as many nurses from an agency and a raise to regular employees might *reduce* rather than raise labor costs.

Ulrich again claimed that Respondent was not claiming inability to pay and, therefore, was under no obligation to turn over the financial data requested by the Union.

The parties met again on June 30, 1988. At this time Ulrich proposed a modest wage increase. The parties were very far apart with the Union asking $1.40-an-hour raise to licensed personnel and 95 cents an hour for everyone else and Respondent proposing 20- and 15-cent-an-hour raise, respectively. Ulrich persisted in his claim that the Union was not entitled to the financial data it requested in writing on June 9, 1988. He suggested that the Union speak to Beverly officials over him.

The wage reopener clause called for interest arbitration, i.e., if the parties couldn't agree on the wage raise than a mutually agreed upon arbitrator would. The arbitration was set for September 20, 1988. The arbitrator heard the case but the parties agreed to ignore his award because they had reached a new contract on their own to replace the agreement which ran from October 1, 1985, to September 30, 1988. Respondent never did turn over the information requested on June 9, 1988. On September 30, 1988, the Union became affiliated with District 1199 NE.

Between the June 30, 1988 meeting and the parties arriving at a contract in September 1988 Attorney Daniel Livingston replaced Ruth Pulda for the Union. Livingston spoke in early July 1988 and in August 1988 with an attorney representing Respondent named Howard Blum. Although Blum indicated that some of the data the Union requested would be turned over it is stipulated by Respondent that it never did turn over any of the information requested.

It seems clear that Respondent, through Ulrich, was pleading the functional equivalent of inability to pay, when he said to the Union that Respondent was having tough financial times and presented press releases and newspaper articles stating that Beverly was in serious financial trouble. In light of this the Union's written request for financial information was appropriate and Respondent violated Section 8(a)(5) when it failed and refused to turn the information over to the Union. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). However, since the parties reached agreement on a new contract I will not order as a remedy that this data now be turned over to the Union.

XXX. POND POINT CONVALESCENT HOME, GILFORD, CONNECTICUT; TRIAL ON APRIL 25 AND 26, 1989; CHARGING PARTY IS DISTRICT 1199 NE

Beverly purchased this facility in 1986. The prior owners had a collective-bargaining relationship with the Union. Beverly and the Union entered into a new collective-bargaining agreement effective October 1, 1988, to October 1, 1989.

A. *Threat of Discharge by Food Service Supervisor Nathan Hairston*

Nathan Hairston ran the kitchen at this facility. The night cook in July and August 1988 was named Eugene Metzer, who was referred to in this litigation as Gene the cook. Dietary aides Vicky Buker and Lisa Billings and other dietary aides complained among themselves about Gene the cook. They felt that Gene the cook was sexually harassing them, e.g., making comments that women weren't any good for anything, commenting on the aides' figures, and commenting on Buker's undergarments.

A number of aides who worked evenings decided to bring these complaints to the attention of Kathy Pronovost, a nurses aide, who was a union delegate.

On August 8, 1988, around 6 or 6:30 p.m. three dietary aides, Vicky Buker, Lisa Billings, and Sharon Smith, who were on break, went upstairs to see Pronovost, who was the only union delegate working at that hour. They expressed their complaints about Gene the cook to Pronovost. Pronovost called over dietary tech Coleen Austin and Pronovost told Austin that she should listen to what the aides had to say. The aides expressed their complaints about Gene the cook to Austin. Austin, who is not in the bargaining unit, said she would let Nathan Hairston know of their concerns.

The next day, August 9, 1988, Austin told Hairston about the complaints of the aides as voiced to her and union delegate Pronovost. Hairston told Austin that he had previously received similar complaints about Gene the cook. Later that day Hairston encountered aides Vicky Buker and Lisa Billings. He was furious. He told the women that they had gone over his head in complaining upstairs about Gene the cook and should have come to him instead. He told them that if they went over his head again they would be fired. In this conversation Hairston yelled at Buker and Billings.

Obviously, Buker, Smith, and Billings were engaged in protected concerted activity when they confered with Pronovost and Austin. Hairston's threat that they would be fired if they did it again was an unlawful threat in violation of Section 8(a)(1) of the Act. *Polatch Corp.*, 236 NLRB 707 (1978).

I find Buker and Billings to be very credible. They were corroborated in significant details by Pronovost and Austin, e.g., Pronovost and Austin corroborate that the women did complain about Gene the cook on August 8, 1988, and Austin, who was a witness for Respondent, testified that she saw and heard Hairston yelling at Buker and Billings on August 9, 1988, but could not make out what words he was saying.

Although Hairston was fired by Respondent in November 1988 and may have no love for Respondent, I nevertheless find him unworthy of belief as a witness and, therefore, discredit his denials that he ever threatened the women with discharge. Eugene Metzer, i.e., Gene the cook, who also is no longer in Respondent's employ did not testify.

B. *Discharge of Vicky Buker*

Dietary aide Vicky Buker was discharged on August 10, 1988, the day after she and Lisa Billings were threatened with discharge by Hairston. (See sec. A, above). After Hairston threatened Billings and Buker with discharge for going over his head and making a complaint to union delegate Pronovost, Buker called Pronovost, and told her what happened. The next day Pronovost confronted Hairston to complain about what he had said to Buker and Billings. Pronovost and Hairston argued.

Later that same day, August 10, 1988, Hairston told Buker that he had warned her about talking to Pronovost and going over his head and that she was fired. I credit Buker. She impressed me as an honest woman. Accordingly, I conclude that the discharge of Buker was in violation of Section 8(a)(3) of the Act.

I don't credit Hairston who claims he fired Buker because of her work performance, e.g., she sometimes didn't wear a hairnet and didn't cooperate with her fellow employees in getting the job done or working overtime. Hairston claimed further that other dietary aides complained to him about Buker. I don't believe him. There was no written record whatsoever in Respondent's files that addressed defects in Buker's job performance. No poor performance evaluations. No warnings. Nothing.

When one considers the chronology of what happened it is clear that Buker was discharged because of her protected concerted activity of complaining with others to a union delegate and seeking appropriate action about a condition of her employment, namely, that she and others were being subjected to sexual harassment. Even though Buker was a probationary employee and as such could not avail herself of the grievance-arbitration clause of the contract, she is nonetheless protected from being fired for an illegal reason as she was here.

C. *Threatening Employees with a Lawsuit*

On June 3 and 24, 1987, long before the incidents involving Gene the cook and the discharge of Vicky Buker, the Union engaged in informational picketing at the facility. The complaints of the Union were many and were recorded in an open letter to Administrator Jordan Shapiro and handed out to the press who covered the picketing. A big complaint was that major construction being done at the facility was hazardous to residents and employees because of toxic fumes, etc., caused by the construction work.

In the open letter, which was given to the press, Administrator Shapiro was, among other things, referred to as a racist, e.g., the letter was addressed to ''Mr. Shapiro and Beverly Corporation'' and the letter stated that the workers refused to accept ''your racist . . . attitude.'' It went on to claim that racist remarks had been made to union delegate Jeannie Blake and about Union Secretary-Treasurer Carmen Boudier. Toward the end of the open letter it stated ''we are not going back to slavery.''

The letter was signed by 32 employees. Neither Kathy Pronovost nor Barbara Stoltman, a union delegate who was an employee of Respondent on union leave of absence, signed the letter. However, in newspaper articles, about the picketing, Kathy Pronovost was described as spokeswoman for the group of demonstrators and Stoltman admitted at the

hearing that she helped draft the open letter referred to above and she was also described in the press as being present during picketing when the letter was distributed.

Administrator Shapiro testified that he was very upset about being called a racist. He claims he received many inquires from friends, family, and business associates as to why he would be called a racist. He even claims that being called a racist interfered with he and his wife being able to start a family. He didn't elaborate on this last point. Suffice it to say his wife had given birth to a healthy child by the time of the hearing. In any event, Shapiro consulted counsel and paid a $75 fee for a Connecticut lawyer to write separate letters to Kathy Pronovost and Barbara Stoltman demanding that they retract their statements referring to him as a racist or be sued for defamation.

Shapiro was told by his superiors that Beverly would not support any law suit, although Beverly did reimburse Shapiro for the $75 he paid for the retraction letters counsel sent to Pronovost and Stoltman. Pronovost and Stoltman never sent letters of retraction and claim they never personally referred to Shapiro as a racist. Shapiro never did file a law suit and at a meeting between the Union and Respondent the Union was informed that Respondent did not support the law suit and had nothing to do with the threat of a law suit.

Shapiro was not without reason to believe he was defamed by these two women and had a meritorious law suit and he acted, I believe, in good faith in causing the letters to be sent. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) There was no evidence at the hearing that he was a racist and, therefore, the referral to him as a racist was a low blow.

Considering all the circumstances, in particular, that no law suit was ever filed and that Shapiro went to the law firm on his own after his superiors told him Beverly would not join in the suit, I do not find any violation of the Act when Pronovost and Stoltman were threatened with a law suit.

XXXI. GOLDEN RULE NURSING HOME, RICHMOND, INDIANA; TRIAL ON A 22, 1989; CHARGING PARTY IS UFC 917

The Union was certified as collective-bargaining representative for a service and maintenance unit at this facility in May 1984. A first contract between the parties expired on March 31, 1987. The parties were negotiating for a successor collective-bargaining agreement when it is alleged that Director of Nursing Joyce Kidd violated Section 8(a)(1) of the Act in statements to employees represented by the Union.

Union steward and nurses aide Gloria Gray was in DON Kidd's office in late May 1987. Kidd asked Gray, who as a member of the union negotiating team attended negotiating sessions, how the negotiations were going. When Gray replied that everything was agreed to but wages Kidd stated to Gray that if the Union was not there the employees would get a 20-cent-an-hour raise. It is a clear-cut violation of the Act for management to tell an employee that because the employees were represented by a union they would not get a raise. Kidd's statement was a violation of Section 8(a)(1) of the Act.

Gloria Gray thereafter told her fellow union delegate Cathy Wilson what Kidd said to her.

Respondent owned another facility in Richmond, Indiana, i.e., Oak Ridge, whose employees were nonunion and these employees had recently received a 20-cent-an-hour raise.

Cathy Wilson, also a union delegate and member of the union negotiating team, shortly thereafter, spoke with DON Kidd. Wilson went to see Kidd about changing her vacation and told Kidd that no contract had been agreed to as yet but that she wanted her raise which was due on her anniversary date. Kidd told Wilson that there would be no raises because of the presence of the Union. Kidd went on to ask Wilson what good was the Union. Wilson asked why did Oak Ridge employees get the raise and not the employees at this facility and Kidd said because the employees at Oak Ridge were non union. DON Ridd's statement to Wilson violates Section 8(a)(1) of the Act since Kidd is telling Wilson that because the employees selected a union there would be no raise but you would get a raise if there was no union at the facility.

In or about this same time, DON Kidd also spoke to nurses aide Sharon Thomas, who is not a union delegate. Kidd volunteered to Thomas that the employees at Oak Ridge had gotten a 20-cent-an-hour raise and that if there was no union at Golden Rule its employees, to include Smith, would get a similar raise. This is a clear invitation to an employee to decertify the Union and is a violation of Section 8(a)(1) of the Act. This conversation took place in the breakroom at the facility.

I find violations of the Act because I found Gloria Gray, Cathy Wilson, and Sharon Thomas to be credible witnesses. Gray and Wilson still work at the facility. They had no motive to fabricate. Smith, who quit Respondent's employ prior to the hearing, was also credible. Kidd's statements to the three women were violations of Section 8(a)(1) of the Act. *Keister Coal Co.*, 247 NLRB 375 (1980).

I note that during the negotiations and before Kidd's statements that the Union and Respondent had agreed to make any raise they agreed to retroactive to the termination of the prior contract. This does not mean, however, that Kidd's statements that there would be no raise because the employees were unionized were lawful. These statements were threatening.

Joyce Kidd testified that employees did ask her about their raises on their anniversary date but she doesn't recall who asked her. She would routinely answer no raise until a contract is agreed to by Respondent and the Union. She claims she never said no raise because of the Union. When asked by employees (whose names she can't remember) why employees at Oak Ridge got a raise and not them Kidd concedes she said because no contract and we will abide by the contract whether that means that any raise to employees at this facility would be the same, more, or less than the raise employees at Oak Ridge received and, she added, that being nonunion the employees at Oak Ridge did not have to wait for their raises. I found Joyce Kidd's testimony to be less than totaly reliable. She did not have a clear recollection of what was said compared to Gray, Wilson, and Thomas and I credit those three women over Kidd.

XXXII. BELLEVILLE NURSING HOME, BELLEVILLE, ILLINOIS; TRIAL ON MAY 15 AND 16, 1989; CHARGING PARTY IS MALCOM CAMPBELL

This facility was no longer owned by Beverly at the time of the hearing. Heather Good Workers 161 successfully orga-

nized this facility in the summer of 1987. The Union won an election held on August 7, 1987. Negotiations began in October 1987 for a collective-bargaining agreement. Agreement was reached sometime in May or June 1988.

It is alleged that Respondent violated the Act when it unlawfully issued a disciplinary reprimand to employee Malcom Campbell on November 2, 1987, for alleged misconduct on October 30, 1987. The discipline of Campbell occurred subsequent to union certification but prior to a collective-bargaining agreement being reached and at a time when the parties were negotiating for a first contract. Obviously Respondent still owned the facility at the time.

Malcom Campbell was very prounion. He was a member of the union negotiating team along with four other employees. During negotiations the Union told Respondent's negotiating team, Abe Emery, from Atlanta, Georgia, Facility Administrator John Siliter, and Siliter's assistant, a Ms. Franklin, that the five employees on the negotiating committee would handle complaints at the facility and that Malcom Campbell would be acting as chief steward. This took place prior to Campbell being disciplined.

Campbell, who worked at the facility from May 1981 until December 1988 when he voluntarily quit, was a nursing assistant. In 1984 and 1986 he was actively prounion during two prior union organizing campaigns where the Union had not been successful in organizing the employees. In the election, which the Union won in August 1987, he was the union observer.

On October 30, 1987, there was a mandatory meeting of employees presided over by Administrator John Siliter and Director of Nursing Nancy Schmook. Siliter was upset. Some drug paraphernalia (a burnt spoon and syringe) and an empty beer can had been found on the facility property. Siliter said some people are good and some are bad and if bad get out of the facility. Employee Thelma Sheard was laughing as Siliter spoke and he yelled at her to get out. When she hesitated and asked what would happen if she didn't leave he yelled at her to get out or she would be suspended. She left. After Siliter and Schmook had spoken and the meeting was about to end Malcom Campbell asked if he could say something. He was given permission to speak by Siliter. Campbell said to Siliter, in the presence of a large number of employees, that Siliter had embarrassed the employees and owed them an apology. It was apparent that Siliter was suggesting that one of the employees was responsible for the empty beer can and the drug paraphernalia. Siliter told him to shutup and if he had a complaint to make it in Siliter's office and not at this meeting. Campbell persisted in asking for an apology. The two men started walking toward one another but not in a threatening or menacing manner. Siliter is approximately 5 feet 10 inches tall and weighed 160 pounds whereas Campbell is 6 feet tall and weighed 285 pounds—a classic mismatch. As they walked toward one another Siliter kept telling Campbell to shut up and that he would speak to him in his office. Siliter said I'm going to count to five and Campbell held up his hand and said he's my five and ''high fived'' the administrator. This incident took place at the end of the meeting. Siliter and Campbell left together to go to Siliter's office after Campbell said he'd go to Siliter's office but still felt an apology was due. They passed Thelma Sheard en route and Campbell asked her to join them. In the office Campbell again asked for an apology and Sheard asked if she was suspended. Siliter said she was not suspended and that Campbell would not be disciplined but had nothing else to say and the meeting ended.

Campbell went home that night and prepared a petition. The petition criticized Administrator Siliter for his ''verbal attack'' on Thelma Sheard and his conduct toward the other employees and demanded an apology. On his off-duty hours on Saturday, October 31, 1987, Campbell went to the facility to get employees to sign the petition. He did not try to hide what he was doing. He was observed circulating the petition by Supervisors Darlene Ervin and Joan Garven in the facility dining room. Neither Garven nor Ervin testified. Campbell collected 25 signatures on the petition on Saturday, October 31, 1987, and another 11 signatures on Monday, November 2, 1987.

On Monday, November 2, 1987, at approximately 2:30 p.m., after Campbell had been at work for over 6 hours, Campbell was called to the front office along with Thelma Sheard. Both Campbell and Sheard had signed the petition, which Campbell had circulated. Sheard was suspended. There is no allegation in the complaint that Sheard was unlawfully disciplined. Campbell was given a written warning signed by DON Schmook and approved by Administrator Siliter for insubordination for his behavior at the October 30, 1987 mandatory meeting described above. Administrator Siliter and DON Schmook were present when Campbell received his written warning. According to Campbell, Siliter and Schmook said they did not know anything about the petition he circulated when he asked them about it but there was no direct evidence that they did not know of the petition because neither Siliter nor Schmook testified at the hearing, both having left Respondent's employ by the time of the hearing.

The issue in this case is what was the motivation of Respondent when it issued the written warning to Campbell. Was it done because Responent thought he was insubordinate? Or was it done because of his union activity and because he engaged in protected concerted activity. As noted above, Campbell was acting as a chief steward and Respondent knew it when he asked on October 30, 1987, for an apology from the administrator who had yelled at employee Thelma Sheard and accused the employees of being responsible for the presence of the drug paraphernalia and the empty beer can found on facility property. I credit Campbell who testified that after the mandatory meeting when he met with Siliter in Siliter's office that Siliter said that neither Campbell nor Sheard would be disciplined for their behavior at the mandatory meeting just concluded. Something changed Siliter's mind between the afternoon of October 30, 1987 (a Friday), and the afternoon of November 2, 1987 (a Monday). What caused Siliter to change his mind, I conclude, was the fact that Campbell prepared and circulated a petition at the facility on October 31, 1987 (a Saturday), and on November 2, 1987 (a Monday). If Siliter had decided to discipline Campbell for Campbell's behavior at the October 30, 1987 mandatory meeting why didn't he do so prior to 2:30 p.m. on Monday, November 2, 1987, 3 days after the incident and toward the end of the work day on November 2, 1987, for Campbell, who worked the 7 a.m. to 3 p.m. shift.

It seems clear since I credit Campbell, who impressed me as an honest man, that since Siliter told Campbell he would not be disciplined for his conduct on October 30, 1987, and

since Campbell was nevertheless disciplined but only after he circulated the petition, clearly a protected concerted activity, that Campbell was disciplined for circulating the petition and collecting the signatures of over 35 employees. The issuance by Respondent of the written warning to Malcom Campbell, under these circumstances, was a violation of Section 8(a)(1) and (3) of the Act.

XXXIII. RIDGEVIEW MANOR NURSING HOME, MALDEN, MISSOURI; TRIAL ON MAY 16, 17, AND 18, 1989; CHARGING PARTY IS CWA

The Union tried unsuccessfully to organize this facility in 1986. It returned in 1987 to try again. The employee who called the Union in to try again to organize the facility was Shirley Niswonger. An election was held on July 10, 1987. The Union lost the election. It is alleged that Respondent violated the Act when, on July 8, 1987, 2 days before the election, it removed employee Charisse Bryant, who was on a leave of absence and who was to be the union observer at the election, from her job as a dietary assistant and, in addition, it is alleged that Respondent violated the Act when it discharged Shirley Niswonger on December 31, 1987.

A. *Removal of Charisse Bryant from her Job*

Charisse Bryant, married and the mother of two, was a dietary aide. In 1987 she signed a union authorization card, attended several union meeting, told at least 10 fellow employees that she was prounion, to include Linda Earhart, a close friend of Dietary Supervisor Norma Williams, and she was selected in late June 1987 to serve as the union observer for the July 10, 1987 election.

On June 10, 1987, Bryant went to see Dietary Supervisor Norma Williams. Bryant wanted to take a 30-day leave of absence for personal reasons. Williams initially said no but then contacted Administrator Toni Robinson. Robinson authorized the leave of absence. On June 10, 1987, Bryant signed a preprinted form requesting a leave of absence from June 15 to July 14, 1987. Bryant told Robinson that she felt bad about taking the leave of absence and said that if they needed her they should call her and she would come back to work. Neither Williams nor Robinson told Bryant that if her job was filled by a replacement while she was on her leave of absence that she might not get her job back right away but only if and when there was an opening for a job she was qualified to perform. There is nothing on the preprinted form which Bryant signed requesting the leave of absence which in any way suggests that she might lose her job during her leave of absence.

In addition, there is nothing in the four-page brochure listing employee benefits which suggests an employee may not get his or her job back when his or her leave of absence terminates. The brochure states:

> LEAVE OF ABSENCE
>
> Full-time employees who have completed their probationary period may be granted a personal leave without pay for up to thirty (30) days for justifiable reasons. A leave of absence must be requested in writing and approved by your Supervisor, Department Head, and Administrator.
>
> Medical leaves without pay may be granted to full-time employees who have completed their probationary period up to a maximum of six (6) months. Medical leaves must be renewed each thirty (30) days by a physician's statement certifying continued disability. You may at anytime be requested to see the Company doctor.
>
> A physician's release statement must be presented before returning to work.
>
> During any leave of absence, benefits will not be accumulated: however, you may continue your insurance coverage by personal payment of monthly premiums during the approved leave.

However, in the 31-page Employee Handbook there is such a provision if and only if three sections are read together. The handbook provides

> LEAVE OF ABSENCE
>
> Full-time and Regular Part-Time Non Introductory employees who must be away from work for seven (7) consecutive calendar days or longer, and who plan to return to work may request a Leave of Absence. Requests must be made on a LEAVE OF ABSENCE Request Form obtained your Supervisor or Administrator and should be submitted to your supervisor as far in advance as practical. Where an emergency exists, Leave of Absence requests may be made by phone, however, a written request must be completed and submitted as soon as possible.
>
> PERSONAL LEAVES
>
> Requests for a PERSONAL LEAVE OF ABSENCE must also be made in writing on a LEAVE OF ABSENCE request form submitted and approved by your Supervisor and Administrator. Request for a PERSONAL LEAVE must be for compelling and justifiably necessary reasons. A PERSONAL LEAVE may be granted for up to a maximum of 30 days.
>
> JOB ASSIGNMENT UPON RETURN
>
> Upon returning from a leave of absence, an employee should report to their administrator. If an employee's position has been filled during the leave of absence, the administrator will determine if there are any jobs available for which the employee is qualified to perform. If no position exists, the employee will be given reasonable consideration for placement in future job openings for which they are qualified. The employee returning from a leave of absence is not guaranteed a position, except where state law requires otherwise.

Although Bryant acknowledged in writing that she received the Employee Handbook on December 30, 1985, she had no memory of it nor had she read it. The handbook Bryant received in 1985 was changed in April 1987 but the provisions cited above are the same in both Employee Handbooks.

On June 28, 1987, Bryant came into the facility to pick up her vacation check. She asked Lisa Pressley in the front office to tell Norma Williams who was unavailable at that time to call her because she would be coming back to work

soon. Williams never called her and claims she never got the message.

On July 8, 1987, Bryant went to the facility and was told first by Williams and then by Administrator Robinson that she had been replaced during her leave of absence and there was no job to which she could return when her leave of absence expired.

Bryant was prounion but if there is no evidence that Respondent knew it then it would be impossible to conclude that they replaced her for the reason. Both Robinson and Williams claims that they didn't know Bryant was actively prounion. While there is no direct evidence that they did know I infer from all the evidence that they did know of Bryant's protected concerted activity. There were 68 eligible voters and Bryant, whom I found very believable, testified she told at least 10 of those voters that she was prounion. One of the 10 was Linda Earhart, who is a close friend of Williams. In late June 1987 Bryant was selected by the Union to be the only union observer for the election. It is not reasonable to conclude that Williams and Robinson did not know of Bryant's prounion stance. Respondent mounted a campaign against unionization and had two people come in from outside to help in the campaign against the Union.

I note that Bryant was a good employee. In March 1987, just 4 months earlier, she was selected as the facility's employee of the month. Her performance ratings were good. Bryant took a prior leave of absence in 1986 and returned to her job after the leave of absence without difficulty. During her latest leave of absence (June 15 to July 14, 1987) Respondent hired two new employees and hired a third employee after Bryant was told she had been replaced. I credit Bryant that she told Robinson to call her if she was needed during her leave of absence and I credit Bryant that on June 28, 1987, she asked Lisa Pressley to have Williams call her about returning.

Further, employees Dorothy Brown took a leave of absence from May 25 to June 28, 1987, and returned to work without difficulty as did other employees, e.g., Linda Earhart and Karen Morgan.

On August 26, 1987, Robinson offered a job as a nurses aide to Bryant. Bryant turned it down.

When Bryant filled out and signed the leave of absence request on June 10, 1987, it was incumbent on Respondent to inform her that she might not get her job back on July 14, 1987. The failure of either Williams or Robinson to do so I attribute to their belief that when Bryant's leave of absence expired she would get her job back. I conclude in light of all the evidence and reasonable inferences therefrom that when Williams and Robinson learned that Bryant was as active for the Union as she was they told her she had been replaced in her old job and no other job was available. Accordingly, Respondent violated Section 8(a)(1) and (3) of the Act. The remedy should be backpay for the period of July 8 to August 26, 1987, when Bryant was offered another position with Respondent and turned it down.

B. *Discharge of Shirley Niswonger*

Shirley Niswonger was the employee who asked the Union in 1987 to try again to organize the facility after its unsuccessful 1986 attempt to do so.

Among other things Niswonger, a night cook in the dietary department, wore a union button at work for the 3 or 4 weeks immediately prior to the July 10, 1987 election, which the Union lost. Administrator Toni Robinson and Dietary Supervisor Norma Williams both admit that they knew that Niswonger was prounion.

On December 31, 1987, Niswonger was discharged for 3 straight days of no-call no show, i.e., Niswonger failed to show up for work on December 28, 29, and 30, 1987, and did not call to say she could not make it in due to illness or some other reason. The facts of this case are extraordinary. A review of those facts establish beyond all doubt, and not just by a preponderance of the evidence, which is all that is necessary, that Niswonger's discharge was an outrage and in violation of Section 8(a)(3) of the Act. The real reason for Niswonger's discharge was her prounion posture. She was the *key* employee for the Union in the 1987 campaign. It is apparent Respondent did not want her around for a possible 1988 or 1989 campaign.

On December 21, 1987, Niswonger paid a medical visit to a Dr. Gaston because her family phyisican, Dr. Garner, was unavailable. Dr. Gaston diagnosed Niswonger's condition as ''near pneunomia.'' He gave her a doctor's note which stated, in part, ''Near Pneumonia. Return to work maybe in a week.'' Niswonger had her daughter, Brenda Pettypool, take the doctor's note into her place of employment. Pettypool did so. Pettypool did volunteer work at this facility and was known by the management at the facility.

The next day, December 22, Niswonger was still ill. She was not scheduled to work that day. On December 23, 1987, Niswanger, still ill, went to see Dr. Turner at the Kneibart clinic. He ordered an X-ray and, thereafter, diagnosed Niswonger as having pneunomia. He put her in the hospital. Niswonger asked Dr. Turner to inform her place of employment what her condition was and Dr. Turner said he'd take care of it.

On December 23, 1987, Shirley Niswonger entered the hospital. She asked another daughter, Ethel Niswonger, to go to the facility and pick up her pay check. Because some nurses at the hospital had told Niswonger she could expect to be hospitalized for 7 to 10 days Niswanger told her daughter, Ethel, to tell her employer that she, Shirley, would be in the hospital for 7 to 10 days.

On Christmas Eve, December 24, 1987, Ethel went to the facility to pick up her mother's check. She spoke with Administrator Toni Robinson. Ethel told Robinson that her mother had pneumonia and would be in the hospital for 7 to 10 days. Robinson told Loretta Sue Maddox to make sure the facility sent flowers to Niswonger. I credit Ethel that she told Robinson that her mother would be in the hospital for 7 to 10 days although Robinson claims Ethel never said that and Loretta Sue Maddox, who testified for the General Counsel, doesn't remember Ethel saying that either. Whether she said it or not Robinson was on notice on Christmas Eve that Niswonger was in the hospital with pneumonia. Niswonger received flowers in her hospital room later on Christmas Eve from the facility.

On, Sunday, December 27, 1987, Niswonger was released from the hospital into the care of her family physician, Dr. Garner. Her release from the hospital like all admittances and releases was reported in the local newspaper. Dr. Garner told Niswonger not to go to work until January 8, 1988, and after he had seen another X-ray.

On, Thursday, December 31, 1987, Niswonger went into the facility to present the note from Dr. Garner which advised that Niswonger should not return to work until January 8, 1988, Niswonger was told by Norma Williams that she was fired for no show, no call on December 28, 29, and 30, 1987, which were dates she was scheduled to work. Toni Robinson was not at the facility on December 31, 1987, but when she returned on January 2, 1988, Niswonger spoke to her and Robinson reiterated what Williams had said as to why Niswonger was fired.

Robinson testified that she relied on the December 21, 1987 doctor's note which said that Niswonger had ''near pneumonia'' and could ''return to work in maybe one week'' to mean that Niswonger had to be at work on December 28, 1987. Of course, after receiving the December 21, 1987 doctor's note, Robinson learned from Ethel Niswonger that her mother was in the hospital and had pneumonia and not *near* pneumonia. Robinson saw in the newspaper that Niswonger had been released from the hospital on December 27, 1987. Did Robinson honestly believe patients go from the hospital directly to work. Obviously not. Respondent's horrible treatment of Niswonger can only be attributed to Niswonger's prounion status and Niswonger was discharged for that reason. There is no evidence that Respondent so much as tried to call Niswonger or one of her daughters on December 28, 29, and 30 to see how Niswonger was doing.

Considering all the facts I must and do conclude that Respondent discharged Shirley Niswonger in violation of Section 8(a)(1) and (3) of the Act.

XXXIV. SYCAMORE VILLAGE NURSING HOME, KOKOMO, INDIANA; TRIAL ON MAY 24 AND 25, 1989; CHARGING PARTY IS UFCW 917

There was a union organizing campaign at this facility beginning sometime in May 1987 and ending on July 10, 1987, when the Union won an election to represent a unit of service and maintenance employees, which unit included nurses aides. It is alleged that two nurses aides, Janet Glenn and Debra Wiley, were unlawfully discharged on June 30, 1987, because they concertedly complained about working conditions and because of their union activity and it is further alleged that nurses aide Maggie Roger was discharged on July 2, 1987, because of her support for the Union.

After charges were filed an informal settlement agreement was reached between the Union and Respondent, who had agreed to a collective-bargaining agreement. The informal settlement provided that this case be settled with the three women resigning effective the date of their discharges, each of the three women receiving so-called neutral job recommendations and Janet Glenn and Debra Wiley each receiving $1000. Roper would get no money. The General Counsel opposed the settlement and the three women, after initially signing off on the agreement, expressed severe misgivings about it. I disapproved the settlement agreement.

A. *Discharge of Janet Glenn and Debra Riley*

Janet Glenn began her employment with Respondent in December 1986. Prior to her suspension and discharge in June 1987 she had never been disciplined by Respondent. she was rated as a ''good'' employee on her last performance evaluation.

Debra Wiley began her employment with Respondent in April 1985. Prior to her suspension and discharge in June 1987 she had been disciplined on four occasions for, among other things, insubordination and disrespect to authority.

Both Glenn and Wiley signed union authorization cards and attended union meetings. Glenn was not at work for a portion of May and June 1987 because her son was seriously ill. Glenn had told registered nurse Rosemary Joseph she was prounion. Both Glenn and Wiley spoke out in favor of the union at work. Administrator Jean Wanders claims that she didn't know that Glenn and Wiley were prounion. I didn't believe her. There were only 64 eligible voters, i.e., a small shop, and I infer that Wanders did know they were prounion.

The DON at this facility in June 1987 was Jan Riley. Riley's daughter, Karen Rude, was a nurses aide. On June 23, 1987, Glenn was asked by LPN Barbara Dorsey to distribute breakfast trays. This was a job that Glenn felt that Karen Rude should have done. She told this to Dorsey who said that Rude wasn't available right then and Dorsey again asked Glenn to distribute the trays. Glenn did so. Glenn and Wiley thought that Karen Rude, the DON's daughter, was not carrying her load at work.

Later that morning, June 23, 1987, RN Rosemary Joseph asked Glenn how everything was going and both Glenn and Wiley spoke with Joseph. Glenn did the talking but together they conveyed to RN Rosemary Joseph their displeasure with Karen Rude, e.g., Glenn and Wiley complained that they had to do Rude's work, etc. Joseph asked them, Glenn and Wiley, to come into a patient's room to help her prop up a patient in a bed who was in a near coma condition. They did so.

Glenn's and Wiley's version of the encounter with Joseph was radically different from Joseph's version of what occurred. According to Joseph she was called to a patient's room by either Glenn or Wiley (she couldn't remember which one), as she got to the door she was pulled into the room, the door was shut, and Glenn and Wiley each pointed a finger at Joseph and demanded that she get Karen Rude to do her job and treat Rude no better than they were treated. Joseph claims this encounter with Glenn and Wiley upset and frightened her. I heard Glenn, Wiley, and Joseph. Based on demeanor I credit Glenn and Wiley over Joseph. Joseph did not report this encounter to her supervisor until 2 days later.

Later that very day, June 23, 1987, Glenn and Wiley spoke with Administrator Jean Wanders and again complained about the favorable treatment being accorded Karen Rude, the DON's daughter, over them.

On June 25, 1987, approximately 2 weeks before the scheduled election, Glenn and Wiley were suspended pending investigation of the June 23, 1987 Joseph incident. On June 30, 1987, they were discharged for insubordination and physical and verbal abuse toward RN Rosemary Joseph.

Joseph had been a registered nurse for 16 years and had worked for Respondent for over 10 years at the time of the incident with Glenn and Wiley. It is true that Glenn and Wiley were upset when they spoke with Joseph and Joseph was undoubtedly upset that these aides were complaining about the daughter of Joseph's boss, Jan Riley, the facility DON. Administrator Wanders was no doubt upset with Glenn and Wiley complaining to Joseph and to her about the daughter of her DON, who was second in command at the facility under Wanders. The concerted coplaints by Glenn

and Wiley to Joseph and Wanders were protected and it would be unlawful to discharge Glenn and Wiley for making such complaints. *Meyers Industries II*, 281 NLRB 882 (1986). Hence, the fabrication that Glenn and Wiley in concertedly complaining to Joseph, had engaged in physical and verbal abuse of Joseph. There was no physical and verbal abuse in my judgment since I credit the version of events presented by Glenn and Wiley and not the version of events presented by Joseph.

The decision to discharge Glenn and Wiley was made, according to Wanders, by Wanders and DON Jan Riley. It is my judgment that Glenn and Wiley were discharged because they concertedly complained about a working condition, namely, the preferential treatment accorded to the DON's daughter. I find that they made their complaints about Rude in good faith, i.e., they honestly believed she was being treated better than they were being treated. Their discharges were a violation of Section 8(a)(1) and (3) of the Act.

Evidence at the hearing reflected that in the past that one employee received only an oral warning for arguing with a supervisor. This was the closest misconduct to that alleged against Glenn and Wiley. An oral warning is the least severe punishment while discharge is the most severe.

B. *Discharge of Maggie Roper*

Maggie Roper, a nurses aide, began her employment with Respondent in September 1980 and was close to being a 7-year veteran when discharged on July 2, 1987, for alleged patient neglect involving two total care patients whose initials are FN and MP. The two incidents allegedly occurred on the same day. Roper had been disciplined two or three times in the past and her last performance evaluation was ''satisfactory.'' Roper was prounion and Administrator Jean Wanders admits she knew so at the time Roper was discharged. Roper signed a union authorization card and encouraged other employees in the facility parking lot to do likewise. In addition, on July 17, 1987, there was prounion handbilling done in front of the facility. Roper handbilled along with two officials from the Union. Roper was either the only employee to handbill or one of only two employees to handbill.

Respondent called the police to remove the handbillers. The police arrived on the scene, ascertained that it was union handbilling, and left the area without making any arrests or demanding that the handbillers cease handbilling.

On June 26, 1987, Administrator Wanders admonished Roper concerning the handbilling. Wanders memorialized in a written counseling document that Roper violated Respondent's no-access, no-solicitation rule and caused a safety problem by handbilling where she did, i.e., by the roadway. This is not alleged as a separate unfair labor practice.

On July 1, 1987, Roper was suspended for two incidents of alleged patient neglect. With respect to patient FN it was alleged that Roper who was to hand feed FN had not done so and when she did so she gave FN cold food. Roper credibly testified that she was supposed to hand feed a puree diet to patient FN, that FN's lunch tray had not been brought up to FN's room and Roper went to help feed other patients in the so-called feeder room until the tray arrived. When told that FN's tray was on the floor Roper went and fed FN. Patients are usually fed between 11:30 a.m. and 12:30 p.m. Roper did not feed FN until approximately 2:30 p.m. Roper at the hearing thought it was earlier than 2:30 p.m. but the affidavit doesn't support her. The food was not warmed up before FN was fed and credible evidence at the hearing reflects that this, unfortunately, was not uncommon. Clearly Roper was in the wrong.

With respect to patient MP it is alleged that Roper had not positioned MP correctly, i.e., this full-care patient was supposed to be padded on her left shoulder and positioned or placed in her bed in a way to minimize her bed sores problem. Patients such as MP are required to have their position changed at least every 2 hours to avoid creating and aggravating bed sores. MP can't move on her own. Roper claims that she properly positioned MP and cleaned her up and was guilty of no misconduct whatsoever. Administrator Wanders, who I believe on this point, saw the patient MP and observed that she was not properly positioned. Employee memos written by DON Jan Riley and RN Rosemary Joseph also state that they observed MP to be improperly padded and positioned but Riley never testified at all and Joseph did not testify on this point although she did testify concerning the incident with Glenn and Wiley.

Roper admits she fed FN late and fed her cold food, although she claimed cold food was not uncommon and I find, contrary to Roper, that she left MP improperly padded and positioned. The issue then is whether she was fired for these reasons or because of her union activity. *Wright Line*, supra. I note that Roper had been at the facility for close to 7 years and was extremely active on behalf of the Union and Respondent knew it. The discharge occurs just 8 days before the election and is for patient neglect occurring on the very same day that Janet Glenn and Debra Wiley are discharged, i.e., June 30, 1987.

Prior to Roper's discharge employee Misty Meiring was not fired but only suspended for 3 days for neglecting ''several patients'' by leaving them wet and soiled. Evidence presented during these hearings concerning other facilities in this litigation proved that leaving patients wet and soiled severely aggravates bed sores. Employee Gloria Jackson received only an oral warning for patient neglect. But three employees had been discharged for patient neglect.

Considering all the evidence in this case I conclude that Roper was discharged, rather than disciplined in a more mild fashion, because of prounion activity, e.g., she was either the only employee to handbill or one of only two to handbill, she was counseled against that handbilling; Respondent ran a vigorous campaign against the Union, and she was fired only 8 days before the election. I note that there was no evidence that either FN or MP suffered any serious setbacks or were injured by Roper's neglect toward them. The discharge of Maggie Roper was a violation of Section 8(a)(3) of the Act.

XXXV. PARKWAY MANOR HEALTH CARE CENTER, ST. PAUL, MINNESOTA; CHARGING PARTY IS MINNESOTA LICENSED PRACTICAL NURSES ASSOCIATION; STIPULATED RECORD

Since 1977, the Union has represented a unit of licensed practical nurses (LPNs) at this facility.

The parties have entered into a series of collective-bargaining agreements. One such agreement and the only one applicable to this case was effective by its terms for the period

August 21, 1986, through October 31, 1987. This agreement contained a grievance-arbitration clause.

On February 19, 1987, during the term of that aforementioned collective-bargaining agreement, Administrator Michael Schultz without prior notice to the Union and without affording the Union an opportunity to bargain over the issue announced a general revision of the facility's LPNs. staffing pattern and requested indications of preference for assignment from the LPNS. On April 1, 1987, this new scheduling system for LPNs as put into effect. Between February 19 and April 1, 1987, the parties met and while the issue of the scheduling change was discussed it was not a matter of negotiations but rather Respondent reiterating what it was going to do.

Suffice it to say an unfair labor practice charge was filed as was a grievance under the contract. Both the charge and the grievance complain that Respondent was without lawful authority to do what it did in April 1987 concerning the scheduling of LPNs.

The grievance went to arbitration and the arbitrator found in an award dated August 20, 1987, that Respondent acted in violation of the contract when it implemented the revised general work schedule on April 1, 1987. He also found that as a result some employees' scheduled hours of work changed, some employees' work locations and stations changed, and although there were no layoffs as a result of the change in schedule some employees' hours were reduced. The number of employees adversely affected by the change was not set forth in the award. As a remedy the arbitrator ordered that the revised general work schedule could continue in effect pending the outcome of good-faith bargaining between the parties. The contract was due to expire on October 31, 1987, some 7 months after the new schedule was implemented and some 2 months after the arbitrator's award.

Respondent moved that I defer to the arbitrator's award pursuant to *Olin Corp.*, 268 NLRB 573 (1984), and dismiss this portion of the complaint. The General Counsel opposed deferral. I denied Respondent's motion to defer to the arbitrator's award and dismiss that portion of the case involving this facility on the grounds that the arbitrator's award was clearly repugnant to the policies and purposes of the Act because it ordered no meaningful relief.

The General Counsel and Respondent in August 1989 entered into a stipulation of fact which meant that the hearing involving the allegations at this facility, scheduled for August 21, 1989, would not be necessary.

According to the arbitrator's award, which is part of the stipulated record, there were 25 LPNs at this facility at or about the time of the schedule change.

In the stipulation of fact submitted to me in August 1989 the General Counsel and Respondent stipulated with respect to the schedule change that ''it was anticipated that one employee, Lee Ann Stemig, would lose 16 hours per pay period as a result of the schedule change. In fact, neither Stemig nor any other LPN lost any hours as a result of the schedule change. Three employees did receive floor changes in the facility, e.g., from one nursing station to another. No LPNs received shift changes, nor were any LPNs laid off as a result of the schedule change, however.''

In light of the fact that when the dust settled the impact on the LPNs as a result of the April 1, 1987 schedule change was miniscule, i.e., three LPNs received floor changes going from one station to another, I find there is no meaningful relief that the arbitrator could have awarded. Contrary to the arbitrator's award no employee lost any hours. There is nothing in the record to reflect that Respondent lacked authority to transfer LPNs from one floor to another unless, of course, it did so for an illegal reason and the management-rights clause, section 22 of the applicable collective-bargaining agreement, gave to the management of the facility the right, among other things, ''to assign and delegate work.''

Accordingly, the award was not palpably wrong or clearly repugnant to the policies and purposes of the Act since there was no *meaningful* relief the arbitrator failed to order. I, therefore, in light of the expanded record, reverse my November 30, 1988 decision denying the Respondent's motion and I hereby defer to the arbitrator's award and dismiss the allegations in the complaint involving this facility.

XXXVI. PARKVIEW MANOR NURSING HOME, GREEN BAY, WISCONSIN; TRIAL ON AUGUST 23 AND 24, 1989; CHARGING PARTY IS UFCW 73A

It is alleged that during a union organizing campaign which the Union lost that Respondent, by Rod Panyik, a human resources representative, in May 1988, violated Section 8(a)(1) of the Act on two occasions by threatening employees that they would not get their 2-percent wage increase in July 1988 because of the Union.

Back in August 1983 Respondent, who had recently purchased this facility, promised the employees that for the next 5 years they would get a 4-percent raise each year. After a year or two Respondent reneged on its promise and began giving the employees a 2-percent raise in January and a second 2-percent raise in July. This, of course, works out to be a 3 percent raise for the year.

In late 1987 the employees were told that they would get a 2-percent raise in January 1988 and a 2-percent raise in July 1988. In early 1988 the union organizing campaign began. The election was scheduled for May 23, 1988.

On May 11, 1988, Rod Panyik, a human resources representative running Respondent's campaign against the Union, spoke to a group of employees. Employees Teresa Baeman and Catherine Streu testified that Panyik told the employees that there could be no pay raise during the negotiating period after a union wins an election and that any raise would have to be agreed to by the Union and Respondent. This is a threat in violation of Section 8(a)(1) of the Act because wage *programs* must be kept in effect during negotiations, i.e., parties would continue to negotiate but previously scheduled pay increases could not be withheld because an election petition is filed or a union wins an election. *299 Lincoln St.*, 292 NLRB 172 (1988).

On May 19, 1988, the Union wrote a letter to Respondent complaining about Panyik's remarks by stating, in part, that the Union objected to the following remarks by Panyik to employees ''if the Union wins the election on May 23, 1988, Beverly could not grant the 2% pay increase in July'' and ''that it was illegal and Beverly would be committing an unfair labor practice.''

There was no evidence at the hearing that Respondent or Panyik wrote back to the Union to say Panyik never said the remarks attributed to him.

On May 20, 1988, their was another meeting at which Rod Panyik spoke to employees. There was a large group of em-

ployees in attendance. It was the last time Panyik addressed a group of employees before the election.

General Counsel and Respondent have stipulated that a transcript of the speech Panyik gave to employees on May 20, 1988, is an accurate transcription of what Panyik said in this May 20, 1988 speech.

The transcription of Panyik's remarks is 25 pages long and Panyik made the following statements regarding the previously scheduled 2-percent July 1988 pay raise:

> And we have the letters recently that I have requested from you as employees, what happens to our pay increases (inaudible). Hopefully, I'll be able to answer most of the questions, if not, then you'll give me questions as you leave.
>
> . . . .
>
> I know that from the history and from talking to you at some point in time you got increases I think for 2 years at 4 percent and then you start getting 2 percent in January and 2 percent in July and its been that way for 2 years and this year you got 2 percent in January again. So that's been the progression for the last 4 1/2 years. You ought to watch, and we want to watch our competition and we watched them very carefully I believe, and I think that they commpare favorably with local facilities, both Union and nonunion, and our policy on wages is a fair one.
>
> . . . .
>
> What about a wage increase in July, are we gonna get it? And folks and I cannot make you promises like that. And someone said to me Rod we were promised it in October/November of last year. If you promised then that's all well and good folks but I cannot stand up here and make promises to you, its against the law.
>
> . . . .
>
> But I said when asked, ''Rod are we going to get the increases.'' Number 1, folks I cannot make any promises, its against the law for me to do that. Some of you, a couple of you said Rod, we were told that in October or November that we would get an increase in July. If you told it, then that's fine, I cannot come now and promise you that you are going to get an increase. Now if a union is voted in and we are negotiating in July we can not give any increases and would not do so until that contract is signed and ratified. Signed by the union and company, and ratified by the employees.
>
> . . . .
>
> Obviously, if the Union were not voted in we would have the right to give a raise, or not to give a raise. During this time folks we cannot change any benefits. They can't get better, they can't get worse, the wages stay the same. Nothing can be changed from the time of the date of this petition until the day of the election. After the election if there is no union, no charges, we are free to do business as normal. If there is a union we have to negotiate.
>
> . . . .
>
> If the company comes along and gives increases like we normally do, why would I need a union? It's just part of the law. The reason for negotiations is to sit down and negotiate over wages, benefits and working conditions.

The clear and unmistakable message from Panyik's statements is that if the Union wins the election the employees will not get the previously scheduled July 2, 1988 pay increase. This is a threat in violation of Section 8(a)(1) of the Act. See *Gould, Inc*., 260 NLRB 54 (1982); *Frank's Nursery & Crafts*, 297 NLRB 781 (1990).

On May 23, 1988, the Union lost the election. There were 40 votes against the Union and 36 votes in favor of the Union.

These two unlawful threats on May 11 and 20, 1988, are violations of Section 8(a)(1) of the Act and, I find, interfered with the election results. Threats violative of Section 8(a)(1) of the Act interfere with an election unless the violations are such that it is virtually impossible to conclude that they could have affected the results of the election. *Enola Super Thrift*, 233 NLRB 409 (1977). These threats, especially the second one to a large group of employees just 3 days before the election, cannot possibly be deemed to have had no affect on the outcome of the election. The election is set aside and a new election in the same unit may be ordered by the Regional Director for Region 30.

XXXVII. PARKVIEW GARDENS CARE CENTER, WATERLOO, IOWA; CHARGING PARTY IS UAW 838; STIPULATED RECORD

It is alleged that Respondent violated Section 8(a)(5) of the Act by unlawfully implementing a vacation buy out program following an impasse during bargaining. The thrust of the allegation, however, as set forth in the parties' stipulation, is that Respondent's implementation of its vacation buy out program differed from that offered only in that the buy out was to occur on January 1, 1987, versus mid-December 1986 as proposed.

The parties agreed in October 1989 to submit the above matter to me in the forms of a stipulated record. This procedure rendered unnecessary the hearing on these allegations which had been scheduled for October 10, 1989.

The Union was certified to represent a unit of service and maintenance employees in December 1983.

In March 1984 bargaining began between Respondent and the Union for an initial labor contract for unit employees. Approximately 20 bargaining sessions were held between March 1984 and October 17, 1986. No bargaining sessions were held between October 18, 1986, and the end of January 1987. The parties failed to reach agreement.

On October 17, 1986, Respondent submitted its final offer to the Union. Included in this final offer was a vacation plan that had first been proposed to the Union on October 6, 1986. On October 20, 1986, approximately 50 of the 100 unit employees engaged in a lawful strike. This strike was current at the end of January 1987.

As of October 27, 1986, Respondent and the Union had reached a lawful impasse in their negotiations. As a result, Respondent's negotiator, J. James Wehrle, sent the Union a letter dated October 27, 1986, informing it that the facility was implementing its final offer—including the vacation buy out policy—effective October 28, 1986.

Pursuant to the implemented vacation policy, employees were required to request their vacation in writing, subject to

approval by their supervisor. Although Respondent received no written vacation requests from its striking employees from the commencement of the strike through December 31, 1986, it did receive a request from Syble Coon, a member of the union negotiating committee, on August 8, 1986, which was prior to the strike. Pursuant to this request, Coon was granted her vacation time and paid from October 18 through November 10, 1986, while she was on strike.

On or about January 15, 1987, Respondent implemented the buy out provision of its vacation policy by sending letters to those employees who had neither requested nor utilized all of their vacation time. Included within each letter was a check constituting full payment for the recipient's accrued vacation time at the rate of 50 percent just as spelled out in Respondent's final offer.

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by unlawfully implementing a vacation buy out program on January 15, 1987. Specifically, it is alleged that Respondent issued buy out payments pursuant to its vacation policy on January 15, 1987, rather than with the first paycheck in December 1986, as contemplated in the proposal contained in Respondent's final offer. There is no factual dispute that Respondent issued the buy out payments in January 1987, rather than with the first paycheck in December 1986. Is this a de minimis change as Respondent agrues or not? If Respondent had implemented the vacation buy out plan as called for in its final offer it is obvious that the employees on strike would have put in for vacation for sometime in December and received more than 50 percent of the vacation money due them or maybe all of the vacation money due them.

At the time Respondent submitted this proposal to the Union it did not expect the Union to call a strike. When the strike ensued on October 20, 1986, the issue confronted by Respondent was whether to issue the buy out checks on the first payday in December 1986—as contemplated in the language of the proposal—or wait until the expiration of the calendar year to determine which employees, including those on strike, were going to use vacation time during the latter part of the year. Respondent argues that because it was entirely possible that Respondent could have issued the buy out checks on the first payday in December, and then have employees request vacation time prior to December 31, 1986, the inconvenience of administering the program under these conditions proved to be a nightmare. If it was so implemented, Respondent would have been issuing checks, rescinding checks, and reissuing them to employees who requested vacation time between the first payday in December and December 31, 1986. That is precisely the point.

In issuing the checks in January 1987 rather than the first pay period in December 1986, Respondent implemented a different vacation buy out program than the one contained in its final offer and employees were adversely impacted by the difference.

The evidence is undisputed that the vacation policy in question was implemented following an impasse in negotiations. Further, there is no evidence that Respondent treated strikers differently from nonstrikers. The point is that Respondent implemented something different than what it had on the table.

The law in this area is well-settled. An employer violates its duty to bargain if, when negotiations are sought or are in progress, it unilaterally institutes changes in existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). However, if parties have bargained in good faith to impasse then an employer may institute unilateral changes in terms and conditions of employment so long as they are not substantially different than any which the employer has proposed during the negotiations. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949); *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976).

In light of the fact that employees were deprived of as much as 50 percent of the moneys due them under the vacation buy out program because of the change in the date of issuing the checks the change from the final offer was a significant change and not a Q minimus change and those employees should be made whole and Respondent in doing what it did violated Section 8(a)(5) of the Act.

SUMMARY AND REMEDY

I find that Respondent committed unfair labor practices at 33 separate facilities located in 12 different States. Unfair labor practices were committed in States as far east as Massachusetts, as far west as Washington, as far north as Wisconsin, and as far south as Texas. A nationwide remedy is appropriate.

I find that unfair labor practices were committed by Respondent during and after union organizing campaigns and were committed after union organizing campaigns which the Union won and those which the Union lost.

I find unfair labor practices at 33 facilities which is approximately 3 percent of Respondent's facilities. I note that if a catastrophe struck the United States killing *only* 3 percent of the American people it would result in a loss of life totaling approximately 7.5 million persons. To put that number in perspective according to the 1981 World Almanac published by Newspaper Enterprise Association, Inc., *only* 1.8 million Americans died in all of America's wars from the Revolutionary War through the war in Vietnam. In other words 3 percent can be a lot. On the other hand a 3-percent rate of inflation or 3-percent rate of unemployment is deemed quite acceptable. But it is my judgment the 3 percent of Beverly's facilities in this case coupled with 15 prior Beverly cases manifests a propensity on Respondent's part to violate the Act and warrants a nationwide order.

There were unlawful threats,[3] interrogations,[4] promises or grants of benefits,[5] and surveillance or the creating of the

[3] Beverly Manor of Monroeville, Fayette Health Care Center, Nount Lebanon Manor Convalescent Center, Carpenter Care Center, Duke Convalescent Center, Meyersdale Manor, Richland Manor, Provincial House Total Living Center, Faith Haven Health Care Center, Pond Point Convalescent Center, Golden Rule Nursing Home, Parkview Manor Nursing Home, Hillcrest Convalescent Center, and Beverly Manor of Reading.

[4] Mount Lebanon Manor Convalescent Center, Carpenter Care Center, Duke Convalescent Center, Meyersdale Manor, Richland Manor, Faith Haven Health Care Center, and Ridgewood Court Nursing Home.

[5] Mount Lebanon Manor Convalescent Center, Carpenter Care Center, and Richland Manor.

impression of surveillance[6] all in violation of Section 8(a)(1) of the Act at many facilities.

Employees were unlawfully disciplined in violation of Section 8(a)(1) and (3) of the Act at a number of facilities:

Debbie Savelli received an unlawful oral reprimand at Beverly Manor of Monroeville;

Seventeen employees were unlawfully fired but later rehired, and an unlawful oral warning given to Joann Clingan at Fayette Health Care Center;

Unlawful oral warning given to Elaine Dukes at Mount Lebanon Manor Convalescent Center;

Unlawful 3-day suspension of Marie Meador and the unlawful discharge of Erika Evans, unlawful written warning to Pamela Newell, and unlawful written warning to Lynn Smith all at Carpenter Care Center;

Unlawful discharge of Lucille Lucas at the Duke Convalescent Center;

Unlawful refusal to rehire Patricia Chroninger at Beverly Manor of Reading;

Unlawful discharge of Suzanne LaFramboise and unlawful written warning to Patricia Spangler at Meyersdale Manor;

Unlawful discharge of Deborah Altemus at Richland Manor;

Unlawful discharge of Jeraldine Bubna, unlawful removal of administrative duties and transfer of Mable Dart and unlawful warnings (one written and one oral) to Joyce Kircher at North Park Manor;

Unlawful suspension and discharge of Precious Beasley and unlawful 3-day suspension of Leonnette Curry at Four Chaplains Convalescent Center;

Unlawful discharge of Linda Johnson at Provincial House Total Living Center;

Unlawful discharge of Kim King at Adrian Health Care Center;

Unlawful discharge of Yvonne Murine at Faith Haven Health Care Center;

Unlawful written warning to Immacula Joseph, unlawful discharge of Nicole Pierre, and unlawful written warnings and discharge of Elias Pierre at East Village Nursing Rome;

Unlawful discharge of Vicky Buker at Pond Point Convalescent Center;

Unlawful written warning to Malcom Campbell at Belleville Nursing Home;

Unlawful discharge of Shirley Niswonger and unlawful removal from job of Charisse Bryant at Ridgeview Manor Nursing Home;

Unlawful discharges of Janet Glenn, Debra Wiley and Maggie Roper at Sycamore Village Nursing Home;

Unlawful discharge of Joyce Garmon at Colonial Park Nursing Home; and

Unlawful written warning, threat of discharge, and discharge of Denise Kirven at Claystone Manor.

There were 8(a)(5) violations, i.e., failure to bargain in good faith at Beverly Manor of Monroeville, Fayette Health Care Center, Beverly Manor of Reading, York Terrace Nursing Center, Meyersdale Manor, North Park Manor, Greene Health Care Center, Stroud Manor, Stenton Hall, Sherman Oaks Care Center, East Village Nursing Home, Torrington Extend-A-Care, Smithville Convalescent Center, Parkview Gardens Care Center and Carpenter Care Center.

There was an unlawful physical assault on a union representative at the Fayette Health Care Center. There was unlawful prohibition on union handbilling at Beverly Manor of Monroeville, Mount Lebanon Manor Convalescent Center, and Meyersdale Manor. There was an unlawful threat of harassment to an employee if she didn't testify in Respondent's favor at an upcoming NLRB hearing before me concerning the Fayette Health Care Center. There was unlawful denial of tuition reimbursement to Diane Mead at Mount Lebanon Manor Convalescent Center. There was unlawful change of a benefit (picking up checks) at Carpenter Care Center. There was disparate and unlawful restriction on the use of the bulletin board at Richland Manor where the bulletin board could be used for almost anything *but* union postings. There was unlawful removal of a bulletin board at Faith Haven Health Care Center, unlawful enforcement of overly broad no-solicitation rule at Ridgewood Court Nursing Home. There was unlawful promise of increased vacation benefits if employees decertified the Union at Magnolia Manor. There was denial of access to the Union at Smithville Convalescent Center.

I will recommend that new elections be held at Four Chaplains Convalescent Center and Parkview Manor Nursing Home because of Responent's preelection unfair labor practices at those two facilities.

This is not Beverly's first encounter with the Board. It was stipulated between the parties that the following list of cases are the reported Board decisions involving Beverly:

1. *Beverly Manor Convalescent Centers*, 242 NLRB 751 (1979), enf. denied and remanded 661 F.2d 1095 (6th Cir. 1981); reaffd. 264 NLRB 966 (1982), remanded 727 F.2d 591 (6th Cir. 1984), reaffd. 275 NLRB 943 (1985).
2. *Beverly Manor Convalescent Hospital*, 247 NLRB 691 (1982), enfd. 659 F.2d 1089 (9th. Cir. 1981).
3. *Beverly Manor Convalescent Hospital*, 250 NLRB 355 (1980).
4. *Hillview Convalescent Center*, 266 NLRB 758 (1983).
5. *Beverly Enterprises*, 272 NLRB 83 (1984).
6. *Beverly Manor of Reading*, 276 NLRB No. 125 (1983), rescinded by unpublished Board Order January 9, 1986.
7. *Maple Grove Convalescent Home*, 274 NLRB 1102 (1985).
8. *Cumberland Nursing Center*, 263 NLRB 428 (1982).
9. *Hale Nani Health Center*, 279 NLRB 242 (1986).
10. *Leisure Lodge*, 279 NLRB 327 (1986).
11. *Parkview Gardens Care Center*, 280 NLRB 47 (1986).
12. *Fountainview Place*, 281 NLRB 26 (1986).
13. *Provincial House Living Center*, 287 NLRB 158 (1987).
14. *Beverly Manor of Monroeville*, 286 NLRB 1084 (1987).
15. *Fayette Health Care Center*, 286 NLRB No. 105 (Nov. 24, 1987) (not reported in Board volumes).

[6] Beverly Manor of Monroeville, Mount Lebanon Manor Convalescent Center, Carpenter Care Center, Duke Convalescent Center, and Meyersdale Manor.

Suffice it to say the last case could be called Beverly 15 and if the 33 facilities where I find unfair labor practices were committed had been tried separately we could refer to the last case as Beverly 48. A lot of cases. Is it enough though to demonstrate a proclivity to violate the Act and warrant a nationwide order? The answer is yes. I note that on the last day of hearings in Washington, D.C., on December 13, 1989, Respondent introduced into evidence an exhibit which is a letter dated January 9, 1987, from the Regional Director for Region 6 (Pittsburgh, Pennsylvania) to one of Respondent's attorneys listing over 100 meritorious cases involving Respondent in the years 1983–1986.

The Board has authority under Section 10(c) of the Act to order ''such affirmative action . . . as will effectuate the policies of the Act.'' The Board's power'' is a broad discretionary one subject to limited judicial review.'' *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

The Board has issued broad remedial orders in the past. In a series of cases involving *J. P. Stevens & Co.* the Board has ordered corporatewide remedies to include the posting of notices at all J. P. Stevens plants.[7] The Board did the same thing with respect to the *Florida Steel Corp.* where it ordered a broad cease-and-desist order and the posting of notices at all *Florida Steel*'s facilities based on six prior meritorious cases against *Florida Steel*.[8]

The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease-and-desist order requiring a Respondent to cease and desist from ''in any other manner restraining or coercing employees in the exercise of their Section 7 rights'' rather than the narrow ''in this or any like manner'' language should be reserved for situations where a Respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

With respect to Beverly the history of 15 prior reported decisions coupled with the 35 meritorious cases in the instant litigation clearly show a proclivity to violate the Act on Respondent's part or, at the least, widespread and egregious misconduct warranting an extraordinary remedy. The bottom line is *J. P. Stevens* and *Florida Steel* committed an awful lot of unfair labor practices and so did Beverly.

As in the *J. P. Stevens* cases the order and notice should run to all of Respondent's facilities and consistent with the rationale of *Hickmott Foods*, the cease-and-desist order should include not only an order to cease and desist from all the conduct found violative herein (as great as that was) but that Respondent cease and desist from in any other manner or by any other means interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

The Board has the power and responsibility in the event unfair labor practices are committed to order such affirmative action as will effectuate the purposes and policies of the Act. The orders of the Board should always be remedial and never punitive, e.g., if an employee is unlawfully discharged he or she will be ordered reinstated with back pay but will not be awarded punitive damages.

Considering the litigation history of Beverly in the instant case and the prior 15 reported decigions involving Beverly, considering the fact that headquarters higher than the facility itself were involved in all union organizing campaigns, considering the fact that Beverly is a well organized entity which admits single employer status with all its regions, divisions and facilities it is obvious that an extraordianary remedy is appropriate. The simple fact is that Beverly's unfair labor practices were egregious, took place over several years at numerous locations and clearly manifest a proclivity to violate the Act on Respondent's part. I will order two remedies that are extraordinary in nature:

> (1) The Order will run to Beverly and *all* its facilities, and (2) The notice will be posted at each and every one of Respondent's facilities.

I will not recommend to the Board that it order other extraordinary relief, e.g., I will not order that the notice be posted longer than the normal 60 days, I will not order the payment of litigation costs to the Charging Parties or to the Board, I will not order that the Union be granted access to the facilities of Respondent beyond the right to access the Unions enjoy already by virtue of the Act or specific collective-bargaining agreements, and I will not order that copies of the notice be mailed to the private resident of each and every employee.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are all labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Sections 8(a)(1), (3), and (5) of the Act as more fully spelled out in the sections of this decision captioned 1–37.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[7] See, e.g., *J. P. Stevens & Co.*, 247 NLRB 420 (1980) ; *J. P. Stevens & Co*., 245 NLRB 198 (1979); *J. P. Stevens & Co*., 244 NLRB 407 (1979); *J. P. Stevens & Co*., 240 NLRB 33 (1979); *J. P. Stevens & Co*., 240 NLRB 239 (1978).

[8] See *Florida Steel Corp*., 224 NLRB 45 (1976). See also *Florida Steel Corp.*, 244 NLRB 395 (1979), revd. and remanded 646 F.2d 616 (D.C. Cir. 1981), reaffd. 262 NLRB 1460 (1982), enfd. in pert. part 713 F. 2d 828 (D.C. Cir. 1983).